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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 19__

D. J. McCARTHY, Superintendent,

Petitioner,

v.

RUSSELL LEE HINMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether 28 U.S.C. § 636(b)(1)(B), which authorizes federal magistrates to conduct evidentiary hearings in habeas proceedings and make report and recommendations to the district court constitutes an unconstitutional delegation of the judicial power under article III and violates principles of comity and federalism?

II

Whether on federal habeas corpus application of federal evidentiary rules relating to the use of non-Mirandized statements for impeachment purposes would render harmless any error in the state court's admission of the statement for all purposes at trial?

III

Whether a federal court, consistent with principles of comity, can disregard a state court's mixed determination of fact and law, reweigh the evidence presented to the state court and make contrary findings, even where the federal court's findings are not based on any newly presented facts.

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit are set forth as Appendices A and B to this petition the suggested opinion is reported as Hinman v. McCarthy (9th Cir. 1982) 676 F.2d 343. The unreported opinion of the District Court for the Central District of California appears as Appendix C to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 16, 1982. A timely petition for rehearing and/or suggestion for rehearing en banc was denied on May 11, 1982. An amendment of opinion was also entered on May 11, 1982. This petition for certiorari was filed within 90 days of that date.

This court's jurisdiction is invoked under Title 28 United States Code section 2254.

* * * *

STATEMENT OF THE CASE

In an information filed by the district attorney of Los Angeles County, respondent was charged in count I with the crime of murder, in violation of California Penal Code section 187. (C.T. p. 1.)[1/] In count II, respondent was charged with the crime of assault with a deadly weapon, in violation of Penal Code section 245(a). (C.T. p. 2.) A jury found respondent guilty of murder in the first degree, and guilty of assault with a deadly weapon. (C.T. p. 106.)

[1/] Hereinafter "C.T." refers to the clerk's transcript and "R.T." will refer to the reporter's transcript of the state trial proceedings, while "C.R." will refer to the clerk's record before the United States Court of Appeals for the Ninth Circuit wherein, each document in the record was identified by number and paginated separately. The record of the state court proceedings were lodged with the district court.

Respondent was sentenced to state prison. Sentences on counts I and II were to run concurrently with each other, with the sentence on count II stayed pending appeal; the stay to become permanent upon the completion of the sentence on count I. (C.T. p. 113.) On October 7, 1976, the California Court of Appeal affirmed the judgment of conviction. On October 26, 1976, respondent's petition for rehearing was denied. On December 2, 1976, respondent's petition for hearing in the California Supreme Court was denied.

On August 8, 1977, respondent filed a petition for writ of habeas corpus in the United States District Court for the Central District of California, and a conditional writ was issued on July 19, 1978. (C.R. Nos. 1, 20, 21.) On October 9, 1979, on appeal to the United States Court of Appeals for the Ninth Circuit, the district court was reversed for failure to permit the petitioner to file objections pursuant to 28 U.S.C. § 636(b)(1)(E). (Appen. E.) On December 31, 1980, the district court conditionally granted a writ of habeas corpus. (C.R. No. 43.)

Petitioner filed a timely notice of appeal. On February 16, 1982, the court

of appeal affirmed the judgment of the district court. (Appen. A.) On May 11, 1982, the court of appeals amended its opinion and denied petitioner's petition for rehearing and for rehearing en banc. (Appen. B.)

On June 28, 1982, petitioner's motion to recall the mandate and for stay of mandate pending application in for writ of certiorari was denied (Appen. D.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

CONSIDERATIONS OF COMITY AND FEDERALISM REQUIRE THAT STATE COURT ADJUDICATIONS NOT BE SET ASIDE EXCEPT UPON THE PERSONAL DECISION OF AN ARTICLE III JUDGE WHO HIMSELF HAS CONDUCTED THE HEARING

The Court of Appeal held that so long as an article III judge - District Court Judge retains the power to review independently the magistrate's fact-findings and recommendations, after an

assignment pursuant to 28 U.S.C. § 636(b)(1)(B)[2/] in a 28 U.S.C. § 2254 proceeding, there is no diminution of the state's right to due process and no subversion of the constitutional objectives of article III. (Hinman v. McCarthy, supra at pp. 346-47.)

Petitioner submits that the Federal Magistrates Act of 1976, amended rule 8(b) of the rules governing title 28 U.S.C. section 2254 cases, and title 28 U.S.C. section 636 et seq. as they provide that magistrates may order and conduct evidentiary hearings and permit magistrates to make reports and recommendations to the

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2/ "a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the dispositions, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

district court are in violation of the United States Constitution as investing judicial authority in officers who are "'outside the pale of article III of the Constitution.'" (See Wingo v. Wedding (1974) 418 U.S. 461, 467, 474.)

Prior to the enactment of the Magistrates Act of 1976 and its progeny, concern regarding delegation to magistrates of duties more properly discharged by article III judges had been expressed by several federal circuit courts. In Ellis v. Buchkoe (6th Cir. 1974) 491 F.2d 716, 717, the Court noted:

> ". . . It is clear to us that in post-conviction cases, the evaluation of an applicant's claim to determine their validity, . . . is a judicial function which the Magistrate's Act did not intend to be exercised by a Federal Magistrate but only by an article III judge. Any different interpretation of the Act could raise serious constitutional questions." (Emphasis added.)

The issue was left open by this court in Wingo v. Wedding, supra, wherein the court noted: "We indicate no views as to the validity of investing such authority [to

hold evidentiary hearings] in a magistrate or other officers 'outside the pale of article III of the Constitution'" (Wingo v. Wedding, supra, 418 U.S. at p. 467, fn. 4) and remains an important one that has yet to be resolved. (See Rees v. United State Dist. Court, etc., (9th Cir. 1978) 572 F.2d 700, 702.)

A. Constitutional Constraints

Article III, section 1, of the United States Constitution provides:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

The mandate of article III is clear. However, title 28 U.S.C. section 636, as it applies to federal habeas corpus proceedings emanating from a state conviction (28 U.S.C. section 2254) appears to neglect the source of the authority for the utilization of magistrates.

B. History

Under the Articles of Confederation, the central government had but little judicial power. It was this lack of effective judiciary that was a central weakness of the Confederation. (Federalist No. 22 (A. Hamilton); Glidden Company v. Zdanok (1962) 370 U.S. 530, 558.) The system of appeals depended on state courts for enforcement of what was essentially national interests which were often antagonistic to the interests of the states. By necessity, what emerged in the Constitution was article III and the creation of a national Supreme Court. (Moore, supra, § 0.1, p. 3; The Mayor v. Cooper (1867) 73 U.S. 247, 253 (6 Wall.).)

The founding states were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the "higher" sovereign. (Nevada v. Hall (1979) 440 U.S. 410, 418.) The difficulty lay in the fact that the inferior courts were regarded by the individual states as encroaching upon their rights. It was claimed by the proponents of states' rights that the state

courts were perfectly competent for the work required, and that it would be quite sufficient to grant an appeal from them to the national Supreme Court. (See National Ins. Co. v. Tidewater Co. (1949) 337 U.S. 582, 646-648 (Frankfurther, dissent).)

At the first constitutional convention, in the Committee of the Whole, the proposition "that a national judiciary be established "was unanimously adopted, but the clause "to consist of one supreme tribunal, and one or more inferior tribunals" was first agreed to, then reconsidered, and the provisions for inferior tribunals stricken out, it being argued that state courts could adequately adjudicate all necessary matters while the supreme tribunal would protect the national interest and assure uniformity. (The Constitution of the United States of America--Analysis and Interpretation, Article III, Judicial Department, pp. 583-584 (U.S. Government Printing Office, Wash. 1973, Supp. 1977); 1 Farrand, The Records of the Federal Convention (Rev. Ed. 1937) pp. 124-125; J. Goebel, infra at p. 225.) Eventually, however, the matter was compromised. Inferior courts were not to be required, but the national Legislature

was permitted to establish them.

History clearly supports the notion that the states, although in agreement with the establishment of the supreme tribunal only reluctantly agreed to the permissive establishment of inferior courts while objecting on the grounds that state courts could adequately adjudicate all necessary matters. To the contrary, certainly there is not a clear statement that would permit the broad interpretation given that so directly affect sensitive federal state relation. A fair reading of the history of article III would have the framers rejecting any suggestion that section 2254 proceedings be delegated to less than article III judges, but instead would return this judicial prerogative to the state courts.

C. Federalism

Any suggestion that there is no article III violation where the magistrate is involved only in the fact-finding process and only makes recommendations which are then subject to article III review by the district court judge surely misses the point. (See DeCosta v. Columbia Broadcasting System, Inc. (1st Cir. 1975) 520 F.2d 499, 503-504.) Article III was

created for the very purpose of protecting the state's right to be heard before a particular tribunal.[3/] It has been said that:

> "In a more far-reaching sense, questions of federal jurisdiction are questions of constitutional law. In 1864 former Justice Benjamin Curtis made the still-timely reminder: "Let it be remembered, also, for just now we may be in some danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several States.' There is a recurring temptation to view questions of federal jurisdiction as if they were simple procedural questions, to be resolved in whatever fashion will best serve the desirable goal of efficient judicial administration. Settled doctrine does give some play to such considerations. But, when it is remembered that the delicate balance

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3/ See Note, Article III Limits on Article I Court And The 1979 Magistrate Act, (1980) 80 Colum.L.Rev. 560, 588.

of a federal system is at stake, and that expansion of the jurisdiction of the federal courts diminishes the power of the states, it is apparent that efficiency cannot be the sole or the controlling consideration." (Wright, Miller and Cooper, Federal Practice and Procedure (1975) § 3502, p. 4; fns. omitted; emphasis added.)

D. Due Process

The House Report accompanying section 636(b)(1) states that although the judge must make a "de novo determation" this "is not intended to require the judge to actually conduct a new hearing on contested issues." (H.R. No. 94-1609, 94th Cong., 2d Sess., reprinted in (1976) U.S. Code Cong. & Admin. News, pp. 6162, 6163.) Petitioner submits that the failure to hear anew contested issues of fact or of law denies petitioner the right to due process and to be heard before an article III judge.[4/]

[4/] Concern here, is also addressed to the pro forma referencing of section 2254 matters to magistrates. (Cf. Flower v. Crouch-Walker Corporation (7th Cir. 1975) 507 F.2d 1378, 1380; Fed. Rules Civ. Proc., rule 53.)

As Congress indicated in House Bill No. 94-1609, in discussing section 636(b)(1),

> "Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record. . . ." (Pub.L. No. 94-577; 1976 U.S. Cong. & Admin. News, p. 6163.) However in Crowell v. Benson (1932) 285 U.S. 22, 64, the Supreme Court insisted that constitutional claims be subject to full de novo determination by article III fact finders following initial review by a non-article III commissioner, for ". . . the essential independence of the exercise of the judicial power of the United States . . . requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."

It was recently reemphasized:

> "'To experienced lawyers it is commonplace that the outcome of a lawsuit -- hence the vindication of legal rights -- depends more often on how the factfinder appraises the facts

than on a disputed construction of a statute [or interpretation of a line of precedents]. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.'" (Emphasis added; Swisher v. Brady (1978) 438 U.S. 204, 230 (dis. opn., Marshall, J.).)

It has been colorfully put that:

". . . A 'stenographic transcript correct in every detail fails to reproduce tones of voices and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.'" (Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F.2d 77, 80.)]

E. Precedent Does Not Support The Delegation Of Article III Duties To Magistrates

Congress has properly established article I or legislative courts that need not comply with the requirements of article

III. (See, e.g., Palmore v. United States (1973) 411 U.S. 389 (an article III judge was not needed for the District of Columbia was not a state but uniquely within the umbrella of article I, section 8, clause 17); Gosa v. Mayden (1973) 413 U.S. 665, 673-674 (military); American Insurance Co. v. Canter (1828) 26 U.S. (1 Pet.) 511, 546 (territorial court derived its power not from article III but from the plenary power Congress had over its territories). However such courts have been upheld only when their jurisdiction is limited to the territories, to local matters arising in the District of Columbia and to limited subject matters. (United States v. Saunders (9th Cir. 1981) 641 F.2d 659, 663, cert. denied, 452 U.S. 918 (1981).) "Inherently judicial" tasks, however, must be performed by article III judges. (Id.)

Recognizing this limitation, the court of appeals decision nonetheless, relies upon United States v. Raddatz (1980) 447 U.S. 667, 681-684 which allowed magistrates to perform "inherently judicial" task when they do so under the supervision of an article III judge in support of the position that section 636(b)(1)(B) is constitutional. Such reliance is misplaced.

In Raddatz, the Supreme Court upheld the constitutionality of section 636(b) only insofar as it authorized United States magistrates to conduct hearings in criminal matters on motions to suppress evidence. The court noted that because of the nature of the issues presented and the interests implicated in a motion to suppress evidence by a federal prisoner facing federal criminal charges, (1) due process does not require that a district judge actually hear the challenged testimony, and (2) the delegation of the function to hear motions to supress by a non-article III officer is not in violation of article III so long as the ultimate decision is made by the district court.

In regards to the due process, the Supreme Court found that the process due at a suppression hearing which is not concerned with the ultimate issues of fact as to guilt or innocence may be constitutionally less demanding and elaborate than the protections accorded to a defendant at a trial. The court reasoned that the interests at stake in a voluntariness hearing (in the context of a motion to suppress) do not coincide with the criminal law objective of determining guilt or innocence. In

addition, the court remarked that the interest at stake in a suppression hearing are of a lesser magnitude than those in a criminal trial itself. (Id., at p. 677-681)

F. United States v. Raddatz Does Not Answer Appellant's Due Process Claims

Due process is a flexible concept and requires such procedural protections as the particular situation demands. (Matthews v. Eldridge (1976) 424 U.S. 319, 334.) It may be evaluated in the context of:

> "The nature of the alleged right involved, the nature of the proceeding, and the possible burden on the proceeding . . . ." (Hannah v. Larche (1960) 363 U.S. 420, 442; see also U.S. v. Raddatz, supra, 43 L.W. at p. 4816.)

An analysis of these factors clearly demonstrates why the particular right claimed by the state in a section 2254 hearing must be confirmed.

1. The Nature of the Right Involved

It is the right of the state to be subject to solely the jurisdiction of an article III judge in a section 2254 proceeding that is at issue. In every sense

of the word such right goes to the heart of state-federal relationships.

The importance of this right and the balance it should take is well documented. At the time of the adoption of the Constitution persons favoring States' Rights were opposed to the creation of inferior federal courts with the power to review state judgments. (Berger, Raoul, Congress v. The Supreme Court (Harv. U. Press 1969) p. 143.) It was this opposition that ultimately led to the deletion from the Constitution of any provision for inferior federal courts and the subsequent adoption of the Madison-Wilson compromise motion to make the creation of inferior federal courts a question for Congress. (Id. at pp. 270-271; see also Id. at pp. 135, 141-42.) The framers on the Constitution had expected the review of practically all state cases to be conducted by the Supreme Court. (Id. at p. 270 n 215.)

2. The Nature of the Proceeding

Title 28 United States Code section 2254 subsection (a) provides that the federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to

the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." The effect of a section 2254 proceeding is an extraordinary intrusion into a state court's judicial process.[5/] The scenario to a section

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[5/] As Chief Justice Marshall noted in Ex Parte Bollman (1807) 8 U.S. 75, 97:

> "The State courts are not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court."

Since the Great Writ of Habeas Corpus was designed to provide judicial intervention, when necessary, to assure against confinement without cause by the executive branch, and since a final judgment of conviction in a court of general jurisdiction constitutes a valid determination of cause for confinement (Ex Parte Watkins (1830) 3 Peters 193, 201-202), habeas corpus should not be entertained under section 2254 absent a showing that state procedures are so inadequate as to amount to a suspension of the writ or a denial of due process.

2254 proceeding has been described as:

> "'Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive petitions for federal habeas corpus and successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, examining and reexamining of state criminal judgments for possible constitutional error. . . . No other nation in the world has so little confidence in its judicial systems as to tolerate these collateral attacks on criminal court judgments. . . . This comparatively new concept of federal habeas corpus has dangerously prejudiced the delicate balance of federal-state relations and has seriously degraded the authority of the states and their judicial tribunals.'" (People v. Miller (1978) 85 Cal.App.3d 194, 199.)

Section 2254 which in effect permits district judges to substitute their views for the collective considered judgments and wisdom of the Supreme Court of

the State of California, and section 636(b) which permits a United States magistrate to do the same, certainly has the effect of eroding the faith of the citizens of California in the authority of the California Supreme Court in particular and in the reasonableness of the state judicial process in general. The review by a magistrate of the reasoned and collective judgment of state courts differed so fundamentally from the ruling on a motion to suppress what does not consent itself with ultimate facts that the reasoning of Raddatz should not be extended to deny the state the right to have their judgment. Reviewed solely by an article III judge. (Rose v. Mitchell (1979) 443 U.S. 545, 579-80, Powell, J. concurring.)

Furthermore, legal practitioners involved in habeas corpus matters brought under section 2254 are painfully aware of the difficulties of conducting evidentiary hearing in habeas corpus cases where the facts are stale, witnesses difficult to locate and, when they are found, their memories dimmed by the passage of time. In this respect, the personal observation of an article III judge of a witness' demeanor takes on greater significance than that of

a suppression hearing which would be more contemporaneous to the events. (Note, United States Ex Rel. Graham v. Mancusi (2nd Cir 1973) 457 F.2d 463, 469-70.)

G. The Raddatz Case Does Not Answer Petitioner's Claims Under Article III

The Court of Appeals' reliance on Raddatz for support on the article III question is also misplaced.

Raddatz places great weight on the fact that the entire criminal process takes place under the district court's total (but not direct and immediate) control and jurisdiction and that the delegation does not violate article III so long as the ultimate decision is made by the district court. (U.S. v. Raddatz, supra at p. 681.) The ultimate decision, in Raddatz however, concerns itself merely with the question whether there was an unreasonable search or seizure, not with ultimate issues of fact going to the question of guilt or innocence or the correctness of the collective judgment of the state courts. Petitioner notes that a similar explanation that the ultimate decision is really made by the Court of Appeal or even subsequently by the Supreme Court might also be given. However

this explanation does not satisfy the fundamental problem that questions of credibility cannot effectively be determined on a dry, written record.

Moreover, the issue in the instant case is whether through either article I or through article III pursuant to its discretionary powers to create courts, contravene and discount the clear intent of the framers by delegating authority in effect to overturn the holding of a state supreme court to non-article III personnel. Petitioner submits that such was not the intent of the framers.

II

THE FEDERAL COURTS BELOW ERRED IN MAKING FINDINGS CONTRARY TO THE STATE TRIAL COURT WHERE THE FINDINGS WERE BASED ONLY ON A REVIEW OF THE STATE TRIAL TRANSCRIPT

Petitioner submits that there was overwhelming evidence, apart from the tainted evidence, to support respondent's conviction under a theory of felony-murder. Initially it should be noted that since the question posed is one of fact, it should not have been disturbed unless the State's determination was found to be clearly erroneous. (See Campbell v. United

States (1963) 373 U.S. 487, 493.) Situations involved in findings of fact concerning other than a determination of guilt require the application of the "clearly erroneous" standard. (United States v. Delerme (3rd Cir. 1972) 457 F.2d 156, 159; 28 U.S.C. § 2254(d) (applicant must establish by convincing evidence).)

In this regard, the State Court's finding that the introduction of the non-Mirandized statement was harmless beyond a reasonable doubt should have been viewed by the lower federal courts as presumptively correct. (Alexander v. Smith (2nd Cir. 1978) 582 F.2nd 212, 219, cert. denied, 439 U.S. 990 (1978); Tannier v. Vincent 541 F.2d 932, 937 (2nd Cir. 1976), cert. denied 429 U.S. 1065 (1977).)

California courts hold that all persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design. (People v. Terry (1970) 2 Cal.3d 362, 401.) The intent to commit the felony must be formed prior to the time of the killing and may be proved by circumstantial evidence. (People v. Sirignano (1974) 42 Cal.App.3d 794, 801.) However, a strict

causal relation between the felony and the killing is not required. It is sufficient if both are part of one continuous transaction. (People v. Fuller (1978) 86 Cal.App.3d 618, 623.) For example there is no requirement that the homicide occur while committing or while engaged in the felony or that the killing be part of the felony. It is sufficient that the homicide be related to the felony and have resulted as a natural and probable consequence thereof. (People v. Taylor (1980) 112 Cal.App.3d 348, 358.)

On the morning of June 19, 1975, respondent, Michael Kicklighter, Richard Gutierrez and David Harger, were walking down Lomita Boulevard. (R.T. p. 107-108.) One of them broke into a Pinto automobile. (R.T. p. 120.) When they left, they threw a brick through its window. (R.T. pp. 65-67.) The assault victim, Glen Greene, had observed all this from his apartment and went outside to investigate. He stated he intended to call the police. (R.T. p. 75.) Respondent responded, "What about?" Mr. Greene told respondent about the breaking of the window and said, "Somobody is going to call the police." Respondent, who was sober, called out and

his companion came over. They started fighting with Mr. Greene. (R.T. p. 78-83.) Respondent asked Mr. Greene if he wanted to get stabbed. (R.T. p. 83.) Mr. Greene fled towards his apartment building, and the four assailants followed. (R.T. p. 85, 87.) Harry Hopkins, the victim of the homicide, was standing at the front door when Mr. Greene had just been stabbed in the back by respondent. (R.T. pp. 90-91.) He was stabbed in the back and was bleeding badly. (R.T. pp. 94-95.) Bleeding badly, Mr. Greene escaped into his apartment. (R.T. p. 94-96.)

Mr. Hopkins apparently barred respondent and his companions from entering the apartment. (R.T. pp. 149-153, 173.) For his troubles, they held him down and stabbed him to death with a knife. (R.T. pp. 155-160, 180.) Mr. Hopkins' hand had been pinned behind him and he was on his knees when knifed. (R.T. p. 180.) Respondent stabbed Mr. Hopkins. (R.T. pp. 188-189, 301-303, 308.)

Mr. Hopkins had $200 in his wallet. (R.T. pp. 170-171.) It was missing after the incident. (R.T. p. 343.) At about 1:30 a.m., Rick Gutierrez gave Deborah Waller a wallet to put away. (R.T. pp. 326-327.)

On June 19, 1975, Michael Kicklighter, after waiving his Miranda rights, made statement to the police (R.T. pp. 359-360) implicating David Harger and Richard Gutierrez in the incident. That same day, Mr. Gutierrez also gave a statement to the police after he waived his Miranda rights (R.T. p. 364). He implicated respondent, David Harger and Michael Kicklighter.

The conversation between Sergeant Trinkler and respondent that was admitted over a Miranda objection is as follows:

> ". . . All I said to him was, 'why did you run?' He said, 'My friends were going to rob this man' that he said he thought got out of a pickup truck. 'I didn't want to be associated in the robbery.' Then I asked him who were the friends, what were the names of the friends that were involved in the robbery, and who cut the victim. He said that Ricky Gutierrez was the suspect that cut the victim and the other was Mike Kicklighter and he was the one that held the victim. At that time I observed that he had two fairly large blood stains on the front of his t-shirt and they were glistening,

fresh, wet blood stains. I noted that when I got him out into the street light these blood stains existing on his clothing, and I asked him where he was. He said that he was in the middle of the street, watching from that point and that this was happening on the sidewalk, on the south sidewalk. At that point, I determined that he was obviously -- there was a discrepancy in his story, being that the blood was fresh on his clothing. That's all I asked him." (R.T. pp. 216-217, 223-224, 238-239.)

It is well settled that the admission of prejudicial evidence can justify habeas corpus relief only if the error was material in the sense of being crucial, critical, and a highly significant factor. (Washington v. Estelle (5th Cir. 1981) 648 F.2d 276, 279.) Respondent maintains that the evidence was non-prejudicial and even if it was prejudicial, it was not material.

It should be remembered that respondent's non-Mirandized statement was exculpatory. Respondent stated that "[He] didn't want to be associated in the robbery." Petitioner made no admission of

guilt. Instead he implied indirectly that his friends were the robbers and merely disclosed that Mr. Gutierrez cut the victim while Mr. Kicklighter held him. Revealingly, the police did not identify which victim they were talking about in their questioning of petitioner. The evidence showed that there were two victims; Mr. Greene and Mr. Hopkins, both of whom were cut. Moreover, respondent never identified the robbers. When asked who was involved in the robbery, respondent merely answered with the names of the persons who had cut the victim. Therefore, the effect, if any, of respondent's statement on the jury as it related to the robbery had to be minuscule at most since it was uninformative.

Thus, even if the admission into evidence of the non-Mirandized statement was prejudicial, it was not the type of statement which is material in the sense of being crucial, critical and of a highly significant factor.

III

APPLICATION OF FEDERAL EVIDENTIARY RULES IN SECTION 2254 PROCEEDINGS RELATING TO THE USE OF NON-MIRANDIZED STATEMENTS FOR IMPEACHMENT PURPOSES WOULD RENDER HARMLESS ANY ERROR IN THE STATE COURT'S ADMISSION AT TRIAL OF RESPONDENT'S NON-MIRANDIZED STATEMENT FOR ALL PURPOSES

Petitioner submits that respondent's non-Mirandized statement to the police that his two friends were going to rob Hopkins even though there was no limiting instruction (see Harris v. New York (1971) 401 U.S. 222) to the jury must be considered as proper as impeaching evidence in the habeas corpus proceeding.

The court of appeals held that since "[t]here was no proper instruction advising the jury of the limited use of the statement," it was improperly admitted. The appellate court in that light then reviewed the evidence generated in the state trial below, but failed to consider the impeaching effect of respondent's non-Mirandized statement in resolving whether its introduction was harmless beyond a reasonable doubt.

It is granted that under Harris a limiting jury instruction should have been

given. But the reality is that such a jury instruction would never be given to a California jury, since non-Mirandized impeaching evidence is inadmissible in California. (People v. Pettingill (1978) 21 Cal.3d 231, 237.) The inadmissiblity of this evidence for all purposes at trial because of California's former unique evidentiary rules does not permit federal courts in habeas corpus from considering the statements for impeachment purposes in the habeas corpus proceeding. (Harris v. New York, supra at p. 224.)

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." (Harris v. New York, supra at p. 225.) "The shield provided by Miranda cannot be perverted into a license to use free from the risk of confrontation with prior inconsistent utterances." (Id. at p. 226.) The failure of the lower federal courts in this case is further evidence in support of petitioner's assertion that the determinations of the California courts have not been given due weight in the instant matter.

CONCLUSION

For the foregoing reasons, it is urged that the petition for writ of certiorari be granted.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-267

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19__

D. J. McCARTHY, Superintendent,

Petitioner,

v.

RUSSELL LEE HINMAN,

Respondent.

CONSTITUTIONAL PROVISIONS, STATUTES AND APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

ARTICLE I. In relevant part:

"Section 8.

". . ."

9. To constitute tribunals inferior to the Supreme Court; . . ."

ARTICLE III. In relevant part:

"Section 1

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a

compensation, which shall not be diminished during their continuances in office.

". . . ."

ARTICLES OF CONFEDERATION

"ARTICLE IX. In relevant part:

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; . . ."

STATUTES INVOLVED

Title 28 U.S.C."§ 636 In relevant part:

". . . .

"(b)(1) Notwithstanding any provision of law to the contrary-

"(A) A judge may designate a magistrate to hear and determine any

pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the

court of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject or modify, in whole or

in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

". . . ."

Title 28 U.S.C. "§ 2254 In relevant part:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

" . . . . "

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of

competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or

over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided

for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous. . . . "

FEDERAL RULES OF CIVIL PROCEDURE

"Rule 53. In relevant part:

". . . ."

"(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

". . . ."

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL LEE HINMAN, Petitioner-Appellee, vs. D. J. McCARTHY, Superintendent, Respondent-Appellant	No. 81-5051 D.C. No. CV 77-3012 WMB OPINION

Appeal from the United States District Court for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding
Argued and Submitted October 7, 1981

BEFORE: WALLACE AND TANG, Circuit Judges, and TURRENTINE,*/ District Judge.

WALLACE, Circuit Judge:

McCarthy (the State) appeals from an order of the district court granting a

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*/ Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

writ of habeas corpus to Hinman pursuant to 28 U.S.D. § 2254. The State makes three different challenges to the granting of this collateral relief. First, the State contends that 28 U.S.C. § 636(b)(1)(B), which authorizes federal magistrates to conudct evidentiary hearings in habeas proceedings and make recommendations to the district court, constitutes an unconstitutional delegation under Article III and violates principles of comity and federalism. Second, the State argues that Hinman should be denied federal habeas relief as he has been afforded a full and fair opportunity to litigate his federal claim in state court. Last, the State contends that the district court erred in concluding that the improper admission of a statement elicited from Hinman by the police in violation of his Miranda rights, was not harmless beyond a reasonable doubt. We aff'rm.

I

A jury found Hinman guilty of murder in the first degree and of assault with a deadly weapon, in connection with the stabbing death of Hopkins on the morning of June 19, 1975. The events occurring prior to the stabbing are significant. We review the evidence in the light most favorable to the State. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

Hinman, age 18, and three young friends, Gutierrez, Harger, and Kicklighter, were walking to a hospital, in order to obtain medical treatment for injuries they had suffered in an earlier traffic accident. On the way, Gutierrez entered a parked automobile, apparently searching for something within the car, and then after exiting the vehicle, threw a brick through its window. The contents of the glove compartment were later found scattered on the floor of the automobile.

After the car window was broken, the four youths ran to the hospital. They were denied treatment because they were under age and were returning when the stabbing occurred.

Green had observed Gutierrez throwing the brick through the window of the automobile from his apartment and decided to find a public telephone and to call the police. While riding his bicycle in search of a telephone, Green encountered the four young men and asked them about the breaking of the car window. Green testified that after he mentioned that someone was going to call the police, Hinman pushed Green off his bicycle and the two began to fight in the street. Then, according to Green, Hinman asked Green if he wanted to get stabbed, and Green ran.

When Green reached his apartment house he saw Hopkins standing at the doorway. Hinman and the other three boys

caught up with Green, and Hinman was overheard making the statement "take it there." Green then entered the apartment house, whereupon he first realized that he had been stabbed. A few minutes later, Green went back outside and found Hopkins badly wounded, but was unaware of how the injury occurred.

Dooley, looking through her apartment window, saw the confrontation between Hopkins and the four young men. She saw Hopkins lying on the sidewalk fighting with one of them and heard one of the other young men say, "Turn him around. Come on. Turn him around. We will get him." She then observed one of them pick up an object that looked like a tent stake and turn toward Hopkins. At that point she backed away from the window.

At Hinman's trial, Kicklighter and Gutierrez each asserted his privilege against self-incrimination. A police

officer was permitted to read to the jury statements he had obtained from them shortly after the incident in question. As to the stabbing of Hopkins, Kicklighter told the police that while Hinman was fighting with Hopkins, Gutierrez took Hopkin's wallet out of his pocket. Kicklighter then stated, "As soon as Richard got the wallet, we ran across the street. When we got in Debbie's house, [Hinman] said he had stabbed the guy. [Gutierrez] pulled the guy's wallet out and started counting it. Everybody was supposed to get $5, but he went to the store." Gutierrez told the police that after Hopkins had been stabbed in front of the apartment house, he saw three $20 bills lying on the ground. He admitted taking the money and stated that later Hinman and Kicklighter wanted to "go halves" on the money, but he refused.

Hinman was apprehended by the police shortly after the homicide. When asked why he had run, Hinman stated "my two friends were going to rob this man . . . I didn't want to be associated in the robbery." The trial court admitted this statement despite the absence of proper warnings. The California Court of Appeals held that there was a violation of Miranda v. Arizona, 384 U.S. 436 (1966) (Miranda), but found the error to be harmless beyond a reasonable doubt.

After being denied a petition for hearing in the California Supreme Court, Hinman sought federal habeas corpus relief pursuant to 28 U.S.C. §2254. Hinman attacked his conviction, arguing, among other things, that the admission into evidence of his statement concerning the robbery violated his Miranda rights. The district court assigned the case to a magistrate who recommended that the

district court grant Hinman's relief. The district court agreed with the magistrate that admission into evidence of Hinman's statement, which was obtained without the warnings mandated by Miranda, was not harmless error beyond a reasonable doubt. Thus, the district court issued an alternative writ requiring Hinman's release or retrial.

II

The State argues that the grant of a writ of habeas corpus to a state prisoner based on findings of fact made by a United States Magistrate pursuant to 28 U.S.C. § 636(b)(1)(B), is an unconstitutional delegation of judicial power under Article III. Furthermore, the State contends that such a delegation is incompatible with principles of federalism and comity to the extent that it allows state court judgments on habeas corpus petitions to be set aside by officers who are not Article III

judges. We first consider the constitutional attack.

A.

In United States v. Saunders, 641 F.2d 659 (9th Cir. 1980), cert. denied, 101 S. Ct. 3055 (1981), we upheld the constitutionality of the Magistrate's Act with regard to the delegation of certain jury scheduling and instruction duties to an officer other than an Article III judge. See 28 U.S.C. §636(b)(3). We reach the same conclusion for the delegation in this case. While magistrates are not Article III judges, id. at 663, Congress had delegated certain judge-like functions to magistrates. Under the law, magistrates may conduct evidentiary hearings in habeas proceedings, as was done in this case. 28 U.S.C. § 636(b)(1)(B). The Supreme Court has recognized that Congress may establish "legislative courts" whose judges do not enjoy Article III protections, when

"necessary and proper" to resolve cases arising under the substantive powers conferred upon Congress by Article I. See, e.g., American Insurance Co. v. 356 Bales of Cotton (Canter), 26 U.S. (1 Pet.) 511 (1828) (territorial courts); Crowell v. Benson, 285 U.S. 22 (1932) (delegation of fact-finding to administrative officers in claims under the Longshoremen's and Harbor Worker's Compensation Act); Palmore v. United Staes, 411 U.S. 389 (1973) (local matters arising in the District of Columbia); Gosa v. Mayden, 413 U.S. 665 (1973) (Court of Military Appeals).

In Saunders, we observed that the Supreme Court has suggested that Congress's delegation power is not unlimited, Glidden Co. v. Zdanok, 370 U.S. 530, 549 (1962), and that "inherently judicial" tasks must be performed by Article III judges. United States v. Saunders, supra, 641 F.2d at 663. However we pointed out that the

Supreme Court has recently allowed magistrates to perform "inherently judicial" tasks when they do so under the supervision of an Article III judge. Id. In United States v. Raddatz, 447 U.S. 667 (1980), the Supreme Court faced a challenge to Congress's power to delegate certain fact-finding and recommendation functions with respect to a suppression motion in a criminal case. The Court stated that Congress was alert to Article III values when it vested such decision making power in magistrates and thus made it clear in enacting 28 U.S.C. § 636 that the ultimate decision rests with the district court. The Court stated:

> We need not decide whether, as suggested by the Government, Congress could constitutionally have deleged the task of rendering a final decision on the suppression motion to a non-Art. III officer. . . . Congress has not sought to make any such delegation. Rather, Congress has provided that the magistrate's proposed findings and

> recommendations shall be subjected to a de novo determination 'by the judge who . . . then exercise[s] the ultimate authority to issue an appropriate order.'

Id. at 681-82, quoting S. Rep. No. 625, 94th Cong., 2d Sess. 3 (1976). See also Mathews v. Weber, 423 U.S. 261, 271 (1976).

Although magistrate evidentiary hearings and subsequent recommended disposition of habeas corpus petitions might be considered "inherently judicial" tasks, under Raddatz delegation of those responsibilities cannot be considered unconstitutional as the district judge retains the power to make the final decision. The district judge could, at the request of the habeas corpus petitioner, or on his own motion, conduct his own evidentiary hearing if he deemed it necessary.[1] See Wingo v. Wedding, 418 U.S. 461, 486-87 (1974) (Burger, C.J., dissenting).

B.

The State also contends that magistrate habeas hearings involving state prisoners violate principles of comity and federalism. We conclude they do not. It is true that the Supreme Court has demonstrated a growing concern for comity and federalism considerations governing federal court intervention in state court adjudications. See Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971). The State's argument, however, does not challenge the right of the district court to pass on habeas corpus petitions of state prisoners. The attack is solely upon the use of magistrates to do so. But the State has failed to indicate how an evidentiary hearing held by a non-Article III officer causes any greater interference with a state's right to conduct its own criminal proceedings than an evidentiary hearing

held by an Article III judge. The position of the State, therefore, must go to a different level: that comity and federalism prohibit any interference with a state court judgment except by an Article III judge.

In Brown v. Allen, 344 U.S. 443, 500 (1953), the Supreme Court decided that federal habeas corpus relief must be available to permit state prisoners to relitigate the merits of constitutional questions already litigated at the state level, else a state court would have a final say on constitutional questions which Congress, by the Act of 1867, provided it should not have. However, granting jurisdiction to federal courts to examine alleged unconstitutional restraint of prisoners by the state created an area of potential conflict between state and federal courts. See Darr v. Burford, 339 U.S. 200, 204 (1950). Thus, Congress

enacted several provisions specifically designed to alleviate this tension. For instance, the federal habeas statute provides that a state petitioner must first exhaust his remedies in state court so that the state will have the first opportunity to correct constitutional defects whenever possible. 28 U.S.C. § 2254(b). Similarly, section 2254(d) provides that determinations of fact by a state court of competent jurisdiction and evidenced by a written finding or opinion shall be presumed to be correct, unless one of several specified conditions is found to exist or unless the habeas court concludes that the state court determination was not fairly supported by the record. 28 U.S.C. § 2254(d). See Sumner v. Mata, 449 U.S. 539, 547 (1981) ("This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of

all state courts.").

The State would have us hold that besides these safeguards already provided for by Congress, an additional safeguard, that of an independent judiciary, is demanded by the Constitution's federalism concerns. The State appears to be arguing that the recommendation-disposition procedure provided for in the Magistrate's Act, far exceeds the judicial prerogative relinquished by the states to the federal government upon the adoption of our constitutional plan. See Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 588 (1980). However, the State provides us with neither historical authority nor compelling argument to support this theory.

There is no doubt that the tenure and salary provisions of Article III were

intended by the framers of the Constitution to protect the proper allocation of power among the branches of the national government, as well as to provide a check on those branches should they attempt to encroach upon the states' domain. See id. at 582-83. Although we can envision circumstances in which the states have a significant interest in an impartial federal forum insulated from influence by the federal legislative or executive branches, the State has failed to show the presence of such circumstances in all stages of habeas proceedings involving state prisoners. Congress passed the Magistrate's Act to increase the overall efficiency of the federal judiciary without substantially increasing the number of federal judges. Congress recognized that, given the avalanche of additional work created for the district courts by new statutes and regulations, some sort of

innovative judicial assistance program was neecessary. Mathews v. Weber, supra, 423 U.S. at 267-68. There may be situations where the need for an independent federal judiciary in all stages of adjudication is so strong that such an efficiency goal must succumb to federalism concerns. Here, however, the State has failed to point out what additional risks are incurred when a non-Article III officer assists an Article III judge by holding evidentiary hearings and making recommendations to the district court. This is especially true in light of the fact that the district judge retains the power to reject or modify the magistrate's recommendation. 28 U.S.C. § 636(b)(C).

The State also argued that the overturning of state court judgments by Article I officers constitutes an affront to state autonomy and erodes the faith of the citizens of California in the authority

of its judicial process. That contention cannot be considered meritorious in light of the present statutory scheme under which the district judge retains the power to make the final decision on an application for writ of habeas corpus.

III

The State next contends that Hinman should not be permitted to utilize federal habeas to attack collaterally his conviction, as he has had a full and fair opportunity to litigate his Miranda claim in the state courts. The State relies primarily on the Supreme Court decision of Stone v. Powell, 428 U.S. 465 (1976), where the Court held that once a state has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief because evidence obtained in an unconstitutional search or seizure was introduced at his trial. Id. at 494.

The Court reasoned that Fourth Amendment violations differ from violations of other constitutional rights because they do not tend to impugn the integrity of the fact-finding process or render evidence inherently unreliable. Rather, the exclusion of admittedly reliable and probative evidence from the criminal fact-finding process is justified on the grounds that it deters unconstitutional or otherwise unlawful police conduct. See id. at 484-90. However, the costs of the exclusionary rule are great, as it "deflects the truthfinding process and often frees the guilty." Id. at 490. The Court concluded that the additional deterrent effect, if any, that collateral review of search-and-seizure claims provides, is small in relation to these costs. Id. at 493. Furthermore, the Court suggested that habeas relief should be available primarily for the vindication of

constitutional rights that affect the determination of the accused's guilt or innocence, which is not the case in a typical Fourth Amendment claim. Id. at 491 n.31. See Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1086 (1977).

The State agrues that claims based on violations of Miranda should be similarly treated. The State would distinguish violations of the Fifth Amendment in the form of involuntary or coerced confessions resulting from threats, brutality or other types of coercion on the one hand, from the mere failure to provide an acceptable Miranda warning on the other. The latter, the State contends, does not interfere with the truthfinding process and is simply a judicially created prophylactic rule. As such, the State argues, the Stone rule should apply. See Brewer v. Williams, 430 U.S. 387, 423

(1977) (Burger, C.J., dissenting).

We do not believe, however, the question is open in this circuit. In a brief per curiam opinion, we have rejected this argument. Patterson v. Warden, 624 F.2d 69 (9th Cir. 1980).

IV

The California Court of Appeals held, and the State concedes, that Hinman's statement to the police that his two friends were going to rob Hopkins was made without the protections mandated by Miranda. Hinman argues that this statement was improperly admitted. The State challenges this assumption. Even granting that the police procured the statement in violation of Miranda, the State argues that it may still be admissible. Specifically, the State argues that if a defendant testifies in his own case, statements otherwise excluded under Miranda are admissible for impeachment. Because Hinman

testified that he had no intent to rob before he stabbed Hopkins, the State argues that no substantial harm occurred as the statement, which was offered during the State's case-in-chief, would have been admissible as part of the State's rebuttal evidence.

Hinman contends we need not reach the issue because, under California constitutional law, statements in violation of Miranda cannot be used in rebuttal. People v. Pettingill, 21 Cal.3d 231, 237 (1978). Hinman's argument fails. It is not the California Constitution which is our measuring rod in habeas corpus proceedings, but the federal Constitution. 28 U.S.C. § 2254(a).[2] Our task is to determine whether Hinman's federal constitutional rights have been violated.

This brings us to an analysis of Harris v. New York, 401 U.S. 222 (1971). There, the defendant testified in his own

defense and denied any intent to sell heroin to an undercover officer. He was then asked whether he made certain statements to the police. These statements were made in violation of Miranda. The trial judge instructed the jury that the statements attributed to the defendant could only be used in passing upon the credibility of the defendant and not as evidence of his guilt. The Supreme Court held this to be proper.

It is clear that the statements taken in violation of Miranda were not used in Harris to prove the defendant's guilt. The jury was appropriately instructed. Here, the statements were admitted as evidence of guilt. There was no proper instruction advising the jury of the limited use of the statement. See United States v. Basile, 569 F.2d 1053, 1060 n.3 (9th Cir. 1978) (Hufstedler, J., dissenting). Harris does not obviate the

problem. Therefore, we review this case on the basis that the statement was improperly admitted.

The State contends, however, that admission of the statement was harmless beyond a reasonable doubt as required to prevent reversal under Chapman v. California, 386 U.S. 18 (1967), because there is overwhelming evidence to support Hinman's conviction of felony-murder apart from this statement. Since the error committed in the state trial court was "a federal constitutional error," see United States v. Valle-Valdez, 554 F.2d 911, 915-16 (9th Cir. 1977), we are bound to reverse if "there is a reasonable possibility that the error materially affected the verdict." See id. at 915 (emphasis in original). In Chapman, the Supreme Court held that the "reasonable possiblity" test and "harmless beyond a reasonable doubt" test are essentially the

same. Chapman v. California, supra, 386 U.S. at 24.

The Court in Chapman found reversible error despite the fact that there was a reasonably strong "'circumstantial web of evidence'" against the defendants. Id. at 25. In a later decision, reaffirming the Chapman rule, the Court held the error harmless beyond a reasonable doubt as the case against the defendant was "overwhelming" and "not woven from circumstantial evidence." See Harrington v. California, 395 U.S. 250, 254 (1969). Thus, to decide whether admission of Hinman's statement constituted harmeless error under Chapman, we must evaluate the weight of the remaining evidence in support of his felony-murder conviction.[3]

The only basis for sutaining Hinman's first degree murder conviction is on a felony-murder theory. No question is raised as to whether Hinman committed the

homicide. The issue is whether a first degree murder conviction can be upheld. The California Court of Appeal specifically found that the case had been improperly submitted to the jury on a premeditation and deliberation theory of first degree murder since there was insufficient evidence in the record to support an inference of either. But under California Penal Code § 189, a murder committed during the perpetration of a robbery is murder in the first degree. The only theory of first degree felony-murder that was properly submitted to the jury related to the taking of Hopkins' property by Gutierrez.[4]

In order to sustain Hinman's felony-murder conviction based on the robbery of Hopkins by Gutierrez, the State was required not only to prove that Gutierrez had the specific intent to commit the concomitant felony prior to the time of the killing, People v. Sirignano, 42

Cal.App.3d 794, 801 (1974), but also to show that Hinman, as an aider and abettor of Gutierrez, had knowledge of Gutierrez's criminal purpose when he assisted him in the commission of the robbery. People v. Terry, 2 Cal.3d 362, 401 (1970), cert. denied, 406 U.S. 912 (1972). If Hinman is found to have aided and abetted Gutierrez in the robbery, and the homicide occurred after Gutierrez formed the specific intent to commit the robbery and during the perpetration of that robbery, then under California law, Hinman would be considered a principal and as such guilty of felony murder. Id.

The State correctly argues that under California law, the intent to commit the underlying felony may be proven by circumstantial evidence. People v. Sirignano, supra, 41 Cal.App.3d at 801. The State then points to three pieces of evidence in order to establish by

circumstantial evidence the prior intent to rob on the part of Gutierrez and the knowledge of that felonious intent by Hinman, the earlier rifling of the glove compartment, Kicklighter's account as to the taking of the wallet, and Gutierrez's contradictory and self-serving statement as to the same incident. We emphasize that we are not called upon to determine whether that circumstantial evidence alone is sufficient for a conviction. The issue is whether the State has demonstrated that this evidence is of such strength that we can say that the improperly admitted statement of Hinman did not, beyond a reasonable doubt, materially affect the verdict; or, alternatively phrased, whether the State has demonstrated that because of the strength of its case, there is no reasonable possibility that the error materially affected the verdict.

The State first points to Kicklighter's statement that while Hinman was fighting with Hopkins, Gutierrez took the wallet out of Hopkin's pocket, and as soon as he did, they all ran across the street, and that later there was to be a division of the money. The State contends that this account of the stabbing and the taking of the wallet clearly demonstrates that the group's primary objective was to steal the wallet. The State further contended at oral argument that Gutierrez's conflicting statement that he saw three $20 bills lying on the ground is so unbelievable and self-serving, that it lends further support to the inference that the group planned to rob Hopkins from the start.

Obviously, the fact that the group ran across the street as soon as Gutierrez got the wallet would lend the most support to this inference, since the statement that

Gutierrez took the wallet out of Hopkin's pocket while he was fighting with Hinman can just as easily support the inference that Gutierrez was acting independently and spontaneously as it would the inference that it was part of some common objective of the group. As to the running across the street, although it could be argued that such action implies that Hinman was aware of Gutierrez's plan to rob Hopkins, this action is somewhat ambiguous as Hinman may have run because he had just stabbed Hopkins. The fact that the group ran across the street immediately after the wallet was taken by Gutierrez would have greater significance if there had been no fight between Hopkins and Hinman and no stabbing. It is quite possible that the members of the group began running across the street at the same time, but for different reasons: Gutierrez because he had just stolen the wallet, Kicklighter

because he had witnessed this and Hinman because he had just stabbed Hopkins. Although Kicklighter's account of the incident strongly suggests that Gutierrez formed the intent to rob Hopkins prior to the stabbing as required under California law for felony-murder, neither the fact that they all ran across the street right after the wallet was taken nor that they later decided to divide the money, strongly suggests that the main objective of the group was to rob Hopkins. The first of these facts could just as easily have been conincidental, since as discussed above, Hinman probably had stabbed Hopkins near the time the wallet was taken. The fact that they later decided to divide the money could just as likely have been an afterthought by the group rather than the culmination of their original plan.

Another piece of evidence used by the State to support an inference of the

robbery intent is the rifling of the glove compartment that took place sometime before the boys encountered Hopkins. The State suggests that this incident, together with the stabbing of Green, are supportive of the position, accepted by the California Court of Appeal, that there was a general intent to steal on the part of the group prior to the killing.

However, no evidence that anything was taken from the car was ever introduced by the prosecution. Rather, the owner of the car testified that everything in the glove compartment had been taken out and scattered on the floor. Gutierrez told the police that the reason he threw the brick through the window was because he was mad and showing off. In light of these additional facts, there is an equally plausible inference that Gutierrez, or possibly the entire group, had the general intent to vandalize that morning, rather

than the intent to steal.

The State contends that the stabbing of Green further strengthens the inference that the group had the general intent to steal. But Green testified that the fight began when he mentioned that someone was calling the police. No attempt was made to take any of his property, such as his bicycle, and no demands for money or other property were made when he was surrounded by the group.

By comparison with the circumstantial evidence and possible inferences therefrom, the improperly admitted statement of Hinman goes right to the root of what the State must prove for a felony-murder conviction. While disassociating himself from the enterprise, he specifically states that the event in question was a robbery. Under these circumstances, it cannot be said that the State has proven beyond a reasonable doubt

that its case was so strong that the improper admission of Hinman's statement did not materially affect the verdict. Nor can it be said that there is no reasonable possibility that the error materially affected the verdict. The district judge found the State had not met its burden. We cannot say the district judge was wrong.

The writ in question is, of course, directed to that part of the state judgment dealing with first degree murder. The inadmissible statement had no effect upon Hinman's conviction of assault with a deadly weapon.

AFFIRMED.

FOOTNOTES

1. 28 U.S.C. § 636(b)(1)(C) states that:

> [T]he magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by the rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

2. 28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

3. The State contends that this examination would bring us into conflict with Sumner v. Mata, 449 U.S. 539, 547 (1981). There, the Court directed the federal court to identify its reasons when overturning a state finding of fact in a habeas corpus case. But here, no finding of fact is being attacked. The question is not whether the jury could have found that Hinman had the requisite felony-murder intent based upon the evidence presented to it. Rather our inquiry goes to the strength of the prosecution's case absent the tainted statement. Thus, no finding of fact by the state jury is being reviewed. For the same reasons, the State's contention that the district court should have applied the clearly erroneous test to the state jury's findings is rejected. That test

applies to factual review entirely different from that charged to the federal court in this instance. See, e.g., United States v. Flickinger, 573 F.2d 1349, 1356 (9th Cir.), cert. denied, 439 U.S. 836 (1978).

4. The actual instruction read, "If you find that Ricky Gutierrez did not form the intent to take property from Harry Hopkins until after the stabbing of said Harry Hopkins -- if Ricky Gutierrez did such act, then you are instructed that Harry Hopkins was not killed in the perpetration of, or an attempt to perpetrate, the crime of robbery, and as such it is not murder in the first degree under the felony murder rule."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL LEE HINMAN,	No. 81-5051
Petitioner-Appellee,	D.C. No. CV 77-3012 WMB
vs.	
D. J. McCARTHY, Superintendent,	AMENDMENT OF OPINION AND DENIAL OF REHEARING
Respondent-Appellant.	

BEFORE: WALLACE and TANG, Circuit Judges and TURRENTINE,*/ District Judge.

The Opinion filed in the above matter on February 16, 1982, is amended as follows:

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*/ Honorable Howard B. Turrentine, United States District Judge, Southern District of California, sitting by designation.

The sentence beginning "Thus, . . .," five lines from the bottom of the first column, slip op. 828, footnote 3, shall read: "Thus, no finding of fact by the state jury or finding accepted by the California Court of Appeal is being reviewed."

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner, v. D. J. McCARTHY, etc. Respondent.	)	No. CV 77-3012 WMB(S) JUDGMENT

The Court has this date signed and filed an order entitled "Order Conditionally Granting Petition for Writ of Habeas Corpus."

Pursuant thereto, the Court grants judgment in favor of the petitioner and against respondent.

IT IS ADJUDGED that a writ of habeas corpus shall issue discharging petitioner from custody and setting aside petitioner's conviction, which writ of habeas corpus shall be effective 120 days from the date this Judgment becomes final,

unless within said 120 day period the State of California shall institute proceedings for a new trial.

The Clerk shall transmit a copy of this Judgment, by United States mail, to petitioner, petitioner's counsel, the Attorney General of the State of California, and the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles.

Dated: December 30, 1980.

WILLIAM MATTHEW BYRNE, JR.
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner, v. D. J. McCARTHY, etc. Respondents.	No. CV 77-3012 WMB(S) ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C.A. § 636(b)(3) (West Supp. 1980), attached is the Report and Recommendation of the United States Magistrate who has reviewed the petition filed herein for issuance of a writ of habeas corpus.

The Court has reviewed the petition, the return, the records submitted therewith, the traverse, as the attached Report and Recommendation; it has further reveiwed the respondent's Objections to the Magistrate's Report and Recommendation and the petitioner's Response to Respondent's Objections.

The Supreme Court has now held that the delegation of power to magistrates to make proposed findings and recommendations, which shall be subjected to a de novo determination by the district judge, does not violate Article III of the Constitution. (See United States v. Raddatz, 100 S.Ct. 2406, 2415-16 (1980).) This district, therefore, did not violate the Constitution in delegating fact-finding and recommendation functions in habeas corpus proceedings, pursuant to the Federal Magistrates Act, 28 U.S.C.A. § 636(b)(1) (West Supp. 1980), because "the ultimate decision" is still made by this Court. (Raddatz, 100 S.Ct. at 2416.)

Respondent's challenge to the constitutionality of 28 U.S.C § 2254 (1976), which provides federal habeas corpus relief for persons in state custody, is without merit. It is well-settled that federal district courts have jurisdiction

to issue writs of habeas corpus after the prisoner in state custody has exhausted his state remedies. (See, e.g., Rose v. Mitchell, 99 S.Ct. 2993, 3003 (1979); Jackson v. Virginia, 99 S.Ct. 2781, 2790 (1979); Wainwright v. Sykes, 433 U.S. 72, 78-81, 97 S.Ct. 2497, 2502-03; Stone v. Powell, 428 U.S. 465, 494 n. 37, 96 S.Ct. 3037, 3052 n. 37 (1976); Preiser v. Rodriquez, 411 U.S. 475, 485-94, 93 S.Ct. 1827, 1834-39 (1973).) Because the petitioner has exhausted his state remedies, federal habeas relief is appropriate because the conviction was obtained in violation of his constitutional rights.

The Court concurs with the Magistrate's determination that there was insufficient evidence of specific intent to commit the offense of stealing, the felony that is requisite to support the conviction based on the felony-murder doctrine, absent

the petitioner's statement, which was obtained without the warnings mandated by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). Because the only basis for sustaining the first-degree murder conviction was the felony-murder theory, and because there is insufficient constitutionally-obtained evidence of an underlying felony to support a conviction on that theory, the Magistrate was correct in concluding that the improper admission of the petitioner's statement was not harmless error within Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726 (1969).

Therefore, the Court concurs with and adopts the findings and conclusions of the United States Magistrate.

Accordingly,

IT IS ADJUDGED as follows:

1. That petitioner was convicted in violation of the Constitution of the Unted States.

2. That petitioner is entitled to a writ of habeas corpus from this Court.

IT IS ORDERED that a writ of habeas corpus will issue unless the respondent and the State of California shall, within 120 days from the date the Court's Judgment becomes final, institute proceedings for a new trial.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Order, the Judgment, and the Report and Recommendation of the United States Magistrate, by United States mail, on the petitioner, petitioner's counsel, the Attorney General of the State of California, and on the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles.

Dated: December 30, 1980.

Wm. Matthew Byrne, Jr.
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner, v. D. J. McCARTHY, etc. Respondent.	No. CV 77-3012 WMB(S) REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY AND ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON PETITION FOR WRIT OF HABEAS CORPUS

This Report and Recommendation is submitted to the Honorable William Matthew Byrne, Jr., United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(3) and General Order No. 104 of the United States District Court for the Central District of California.

Statement of Proceeding

On December 4, 1975, following his conviction of violating Penal Code §§ 187

(first degree murder) and 245(a) (assault with a deadly weapon), petitioner was sentenced to state prison for the term prescribed by law. Petitioner appealed the judgment of conviction to the California Court of Appeal. On October 7, 1976 the Court of Appeal, in a two to one decision, affirmed the judgment. In essence, the majority reached the following conclusions:

1. That although petitioner's Miranda rights (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were violated, the error was harmless beyond a reasonable doubt (Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)(because "substantial evidence exists, apart from Hinman's remarks, to support a murder conviction on a felony-murder theory." (Appendix to Return, Slip Op. at p. 11.)

2. That the extra-judicial statements of Michael Kicklighter, one of three persons who were with petitioner at the time of the commission of the offenses of which petitioner was convicted were properly admitted into evidence as a declaration against Kicklighter's penal interest after the latter refused to testify at petitioner's trial following the assertion of his Fifth Amendment privilege. Additionally, assuming arguendo the extra-judicial statements of Richard Gutierrez (who was also with petitioner at the time of the commission of the offenses of which petitioner was convicted, and who also asserted his Fifth Amendment privilege at petitioner's trial), were erroneously admitted into evidence, "the error was harmless, since Gutierrez' s·atements covered

substantially the same matter as Kicklighter's statements." (Appendix to Return, Slip Op., p. 12.)

3. That although the trial court erred in submitting the case to the jury on a first degree murder theory of premeditation and deliberation, there being insufficient evidence to have justified such a submission, there was sufficient evidence introduced to have permitted the jury to find petitioner guilty of first degree murder on a felony-murder theory.

The dissent, on the other hand, stated that Kicklighter and Gutierrez' statements were improperly admitted as declarations against penal interest, and that the admission of these statements constituted a "clear violation of petitioner's federal constitutional witness-confrontation rights." (Appendix to Return, Slip Op., p. 29.) Further, the

dissent indicated that these errors, together with the conceded Miranda violations, cumulatively constituted "a clear case of reversible error." (Appendix to Return, Slip Op. at p. 31.) Moreover, the dissent could see no basis for concluding the errors were harmless beyond a reasonable doubt under Chapman.

Following the issuance of the decision of the Court of Appeal, petitioner filed a Petition for Hearing in the California Supreme Court. This petition was denied, as was a petition for writ of habeas corpus filed in that court. Parenthetically, it should be noted that although respondent originally argued that petitioner had failed to exhaust available state remedies, it is now conceded that the exhaustion requirement has been satisfied.

On August 11, 1977 petitioner filed his Petition for Writ of Habeas Corpus in this Co rt. In the petition

petitioner has attacked his conviction on the following grounds:

1. That his constitutional right to confront the witnesses against him was violated when the court permitted the extra-judicial statements of Kicklighter and Gutierrez to be introduced into evidence as declarations against their respective penal interests.

2. That the evidence was insufficient to sustain a conviction of first degree murder.

3. That the court erred in giving a felony-murder instruction to the jury.

4. That petitioner's extra-judicial statements were admitted into evidence in violation of the rules enunciated in Miranda v. Arizona, supra,

On September 6, 1977 respondent filed his Return to Order to Show Cause. On September 27, 1977 there was filed

Petitioner's Traverse to the Respondent's Return to the Order to the (sic) Show Cause.

On October 14, 1977, the Federal Public Defender applied to the Court to be appointed counsel for petitioner in this case. On October 18, 1977 the Magistrate granted this application. The Public Defender's application to file a supplemental traverse to the return was also granted. On December 5, 1977 the Public Defender filed a Traverse to Return to Order to Show Cause on petitioner's behalf.

On January 11, 1978 the cause came on for oral argument and now stands submitted.

Statement of Facts

On the morning of June 19, 1975 Glen Greene looked out of his window and saw four persons (who later turned out to be petitioner, Michael Kicklighter, Richard Gutierrez and Da' id Harger) walking down

Lomita Boulevard. One of these persons (who Greene did not believe was petitioner (RT 107-108) entered a Pinto automobile which was parked on the street and appeared to be looking for something. The person then exited the vehicle and threw a rock or brick through the window of it. The four persons then scattered (Rt 65-67.)

Greene subsequently left his apartment and had a conversation with petitioner on the street, during which he (Greene) made inquiry concerning the breaking of the car window. During this conversation petitioner asked Greene if he (Greene) wanted to get stabbed. They were less than an arm's length apart when this statement was made. Greene saw a knife in petitioner's hand at that time. Greene grabbed hold of petitioner's hair before petitioner touched Greene in any way. (RT 11.)

Greene then ran away, with

petitioner and the other three young men chasing him. As Greene neared the door of his apartment building he observed the decedent, Harry Hopkins, standing in the doorway. As Greene was being chased he heared footsteps, turned around and saw petitioner standing behind him with his arms outstretched, no further than an arm's length away. Petitioner was so close the witness could not see whether he (petitioner) had anything in his outstretched hand. Petitioner then made a statement to the effect "take it there." (RT 91-92.) Greene did not realize he had been stabbed until he entered the apartment building. (RT 93-94.)

Several minutes later Greene went back outside and saw the decedent had been wounded badly. Greene did not know how the decedent had been injured. (RT 103.)

Monica Greene, Glen Greene's wife, basically confirmed the testimony of her

husband. She testified additionally that when her husband came to the door of their apartment, he stated that a guy outside had a knife. She also observed her husband had been stabbed. Mrs. Greene also observed the wounds inflicted upon the decedent. (RT 121-124.)

Cecil Davidson, the owner of the Pinto referred to above testified that everything in the glove compartment had been taken out and scattered on the floor. A portion of a cinderblock was lying either in the car or near the curb. (RT 129-131.)

Maureen Dooley, looking through her apartment window, saw the confrontation between the decedent, on the one hand, and petitioner and his three companions, on the other hand. (RT 133-138.) Ms. Dooley testified that one of the four persons (who looked to be in his teens and who resembled petitioner) stated, "He's in there, isn't he? The person then stated, "Never mind.

It doesn't matter. Never mind." The person who was speaking was making no aggressive movements at the time. More conversation ensued, a lot of which Ms. Dooley could not hear. Shortly thereafter she saw the decedent down on the sidewalk, fighting with one of the boys who was wearing a dark shirt. As this boy was over the decedent, another boy said, "Turn him around. Come on. Turn him around. We will get him." At this time Ms. Dooley observed that the boy in the dark blue shirt had the decedent's arms behind him and was turning the decedent toward the other boys. She then observed one or two of the other boys pick up an object which reminded her of a tent stake. One of these boys then turned toward the decedent. Ms. Dooley stated that she believed it was the boy who picked up the item who stated "Turn him around. I will get him." (RT 148-161.) On cr ss- examination Ms. Dooley

stated that she was not sure which of the three remaining boys picked up the object and made the statement about turning the decedent arouns. (RT 165-166.)

Anna Hopkins, the decedent's mother, testified that when her son left home earlier in the evening he had approximately $200 in his wallet. She never saw the wallet again and it was never recovered. (RT 171-172.) Mrs. Hopkins also observed her son being pinned against a jeep on his knees, with a boy holding his (the decedent's) hands behind him. (RT 180.)

Charles Hopkins, the decedent's father, looked out of his apartment window and saw his son being accosted. He identified petitioner as the person who stabbed his son. Mr. Hopkins stated that he cculd see the stabbing motions being made. (RT 187-188.)

Eugene Trinkler, a Los Angeles

Police Department officer, apprehended petitioner in some shrubbery not far from the scene of the homicide. After apprehending petitioner, Officer Trinkler elicited a statement from petitioner which the Court of Appeal and respondent both concede was obtained in violation of petitioner's Miranda rights. The statement made by petitioner, and the legal analysis relating thereto, will be discussed in a subsequent portion of this Report and Recommendation.

Robert Williams, another police officer, overheard the statement made by petitioner to Officer Trinkler. Officer Williams conceded that the police report which was prepared in connection with this case does not contain any mention of a robbery. (RT 266-267.)

Diane Harger testified that on the morning of June 19 she was at Debbie Waller's apartment. Some time that morning

the witness' brother (David Harger), Kicklighter, Gutierrez and petitioner came to the apartment. They stated that David Harger had gotten into a fight with another man and that petitioner had stabbed this man in order to get him off of David. Ms. Harger saw a knife in petitioner's hand. Gutierrez and Kicklighter stated in petitioner's presence that petitioner was the one who did the stabbing, and petitioner did not deny this fact. In fact, he admitted the stabbing and looked scared and stuttered when he did so. Diane Harger also testified that her brother had stated that he was hit by this other man with some kind of stick which resembled a billy club. (RT 307-317.)

Debbie Waller testified that on the morning of June 19 Rick Gutierrez gave her a wallet which she put in her baby's room because there was money in the wallet. (RT 325-331.) Ms. Waller further

testified that the wallet, which belonged to Gutierrez, was turned over by her to a police officer the following day. (RT 346.)

James Kennedy testified that he was with the decedent in a bar on June 19. He saw a wallet in the decedent's possession at this time. As far as the witness knew, the decedent had the wallet in his possession when he left the bar and stated he was going home. (RT 333-335.)

Anna Hopkins and Monica Greene were recalled as witnesses. The essence of the testimony given by them was that no wallet containing money was found on the decedent's person, or among his property, following the stabbing incident. (RT 337-343.)

Raymond Gendreau, a police officer, testified that on June 19 he went to Debbie Waller's apartment and recovered from a dresser drawer located in a bedroom a wallet with $67 in it. There were three

twenty dollar bills and seven one dollar bills in the wallet. The wallet contained an identification with the name Jack Peters on it; however, Richard Gutierrez' picture was on the card. There were other documents in the wallet with Gutierrez' name on them. (RT 353-355.) Officer Gendreau also obtained statements from Michael Kicklighter and Richard Gutierrez. These statements were admitted into evidence over objection as declarations against the penal interests of the respective declarants. As indicated above, petitioner contends his constitutional right to confrontation was violated when the court admitted these statements into evidence. The statements, and the legal analysis relating thereto, will be set forth in a subsequent portion of this Report and Recommendation.

Theodore Light testified that on June 19 he showed a number of photograohs

to the decedent's father. The latter, without hesitation, identified petitioner as the one responsible for the assault on his son. (RT 379-381.)

Doris Hinman, petitioner's mother, testified that she had purchased a buck knife for petitioner prior to June 19 and had not seen the knife since that date. (RT 403-404.)

Defense

Petitioner testified in his own behalf. He stated it was Rick Gutierrez who had broke into the car and he did not know Rick was going to break the car window before it happened. Petitioner also testified that Greene hit petitioner first, at which time petitioner fell to the ground and Greene tried to hit him again. Petitioner denied saying to Greene "Do you wnat to get stabbed?" Petitioner testified that subsequently the decedent jumped off the steps and hi: David Harger in the

mouth. The decedent was on top of David. Petitioner tried to push the decedent off of David, but the former would not move. Petitioner then stood up and was trying to get the decedent off again. He then knifed the decedent. He stabbed him once but does not know where.

Petitioner saw a wallet but does not know if it belonged to the decedent or Gutierrez. He did not take anything from the decedent. He did not know Gutierrez was going to take anything from the decedent, and did not know Gutierrez had taken anything from the decedent until they returned to the apartment and Gutierrez pulled out a wallet and looked inside. Petitioner stated he had no intention of robbing the decedent, or of taking anything from him. Neither petitioner nor Gutierrez nor any of the other boys talked about robbing the decedent.

Petitioner admitted running and

trying to get away from the police after the stabbing incident occurred. Petitioner stated he realized he had stabbed someone. Petitioner also admitted stabbing Glen Greene. Petitioner said he stabbed Greene when the latter was on top of him (petitioner). He stabbed Greene in order to get Greene off of him (petitioner). Petitioner did not see Gutierrez stab the decedent or take his wallet and denied telling Sergeant Trinkler that he did see this happen. (RT 431-456.) Petitioner denied he wanted to split any money with Gutierrez and that he and Kicklighter each wanted fifty per cent of the money Gutierrez had obtained from the decedent. He denied making the statement testified to by Ms. Dooley, namely, "Turn him around, I will get him." (RT 466-469.)

Charles Hart, another police officer, talked to David Harger on June 19 and took a statement from him. Harger's

father was present at this time. The officer was then permitted to read the statement of Harger to the jury, in light of the fact the latter had previously asserted his privilege against self-incrimination.

Dr. Breton, a deputy coroner, testified that the decedent had a stab wound in the right side of the chest and stab wounds in the right side of the small of the back. The stab wound in the abdomen was caused by a sharp, narrow instrument, single edged, similar to a knife. (RT 27-32.)

Discussion

Petitioner's first claim is that his constitutional right to confront the witnesses against him was violated when the court permitted the extra-judicial statements of Kicklighter and Gutierrez to be introduced into evidence as declarations against their respective penal interests.

Thus, after Kicklighter and Gutierrez each asserted his privilege against self-incrimination, Officer Gendreau was permitted to read to the jury the statements he had obtained from them shortly after the incident in question. These statements are as follows:

Kicklighter's Statement

"About 1:30 p.m. I was out with Richard Gutierrez, Russell Hinman and David Harger. They were in a traffic accident earlier. It was my truck they rolled. We went to where the truck was. Then we left and went to Debbie's house. Then the four of us started for Bay Harbor Hospital. Richard got in the car and broke the window. Then we ran to the hospital. They told Richard they wouldn't help him in the hospital. Then we left the hospi al. We were at Lomita

and President when we say a guy chasing Russell. Russell said that was the owner of the car. David started to punch this guy. So did Richard. I stood on the side and didn't do anything. Then they chased him down Lomita to his house. He ran in the house. There was another guy in front of the house. All four of us talked to him. He asked us why we were chasing the guy who lived in that house. Then he punched David. They fought and hit a Jeep, and they fell to the ground. People were hollering out the window of a house there. While he was fighting with David, Richard took the wallet out of the guy's pocket. As soon as Richard got the wallet, we ran across the street. When we got in Debbie's

house, Russell said he had stabbed the guy. Richard pulled the guy's wallet out and started counting it. Everybody was supposed to get $5, but he went to the store. The police showed up later. I hid behind Lucky's. I went home at 4 a.m. in the morning. I am on probation for tampering." (RT 363-364.)

Gutierrez' Statement

"This morning about 1 a.m. I was in Kicklighter's truck with Russell Hinman; Mike Worth, 16, who lives at 266th and President; David Harger; and Tony Tota, 19, who lives at 253rd and President. At 213th and Normandie we had a traffic accident. A traffic report was made. After that we went to Russell's house. Then we went to Bay Harbor Hospital --

Kicklighter, Harger and Hinman. The hospital wouldn't treat me, because I wasn't of age. When we left, Russell got into a fight with a guy and called us. We went back, and then he ran away from Russell. He ran into an apartment. There was another guy standing by a Jeep. Then David talked to him about the fight. Then he and that guy got in a fight. They were both on the ground, and that guy had David Harger by the hair. Then the guy screamed. Russell was standing there. So was Kicklighter. Then we went to Russell's house. As we walked to the house, Russell Hinman said something like, 'I stabbed the guy.' Mike Kicklighter, 16, lives at 254th and President. After the guy got

stabbed in front of the apartment, I saw three $20 bills lying on the ground. I put the money in the baby's room in Debbie's apartment, in a chest of drawers. It's my wallet. All the money in that wallet is what I picked up. Russell Hinman and Mike Kicklighter wanted to go halves on the money, but I said no. Russell Hinman said his mother bought the knife for him last week. It is a buck knife. It's a folding type knife that locks in place, with a 5-inch blade.

". . . .

"There is one other thing I want to tell you. Before we went to the hospital, I was walking down Lomita Boulevard about one-half block west of the hospital with the othe· three guys. I threw a

brick through a Pinto window, because I was mad. I was showing off." (RT 365-367.)

The statements of both Kicklighter and Gutierrez were, of course, hearsay. As indicated above, the Court of Appeal concluded that Kicklighter's statement was properly admitted as a declaration against his penal interest. The court did not expressly decide whether Gutierrez' statement was properly admitted. Rather, the court stated that even if his statement had been improperly admitted, the error was harmless since Gutierrez' statement "covered substantially the same matter as Kicklighter's statements." (Appendix to Return, Slip Op., p. 12.)

The Magistrate believes it is unnecessary, and perhaps impermissible, for the Court to determine whether Kicklighter and Gutierrez' statements were properly admitted under the state law as

declarations against their respective penal interest.[1/] Thus, even if the statements were improperly admitted, it does not follow a federal constitutional violation occurred. As the plurality decision in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed 2d 213 (1970), quoting from California v. Green, 399 U.S.

1/ The Magistrate believes it is impermissible for this Court to determine whether the state courts have properly determined Kicklighter and Gutierrez' statements were properly admitted as declarations against interest because the interpretation of the state's evidentiary rule relating to such declarations (Evidence Code § 1230) would seem to present a matter of state law only. It is well established that state court evidentiary rulings are not cognizable in federal habeas corpus proceedings. (Sigurdson v. Landon, 215 F.2d 791 (9th Cir. 1954); LaBrasca v. Misterly, 423 F.2d 708 (9th Cir. 1970).

149, 90 S.Ct. 1930, 26 L.Ed 2d 489 (1970), noted:

> ". . . Merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."

It is clear, therefore, that not every hearsay violation mandates a finding that the Confrontation Clause has been violated. This fact was also noted by the court in Green, supra, when it stated:

> ". . . While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a

codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence. . . ." (399 U.S. at p. 155.)

The lack of congruence between the hearsay rule and the Confrontation Clause was recently recognized in United States v. Eaglin, No. 75-2720)9th Cir. August 10, 1977). In Eaglin the Court, in interpreting the plurality decision in Dutton, supra, stated that a four-pronged test must be employed in determining whether a constitutional violation has occurred when the extra-judicial statement of a declarant is admitted into evidence and the defendant was not afforded the opportunity to cross-examine the declarant due to his unavailability as a

witness.[2/] The test, the application of which is designed to determine whether the trier of fact was afforded a satisfactory basis for evaluating the truth of the extra-judicial declaration, is as follows:

"1. The declaration must contain no express assertion of a past fact.

"2 The declarant must have personal knowledge of the identity and role of the participants in the crime.

"3. The possibility that the declarant was relying upon faulty recollection must be remote.

[2/] The fact that Kicklighter and Gutierrez each asserted his privilege against self-incrimination made them unavailable as witnesses. Evidence Code §240; Rule 804(a), Federal Rules of Evidence.

"4. The circumstances under which the statements were made must provide reason to believe that the declarant did not misrepresent the defendant's involvement in the crime."

See also U.S. v. Di Rodio, No. 77-2448 (9th Cir., November 30, 1977).

In the present case, therefor, the test set forth above must be applied to Kicklighter and Gutierrez' statements in order to determine whether a Confrontation Clause violation resulted from their being admitted into evidence.

Taking Kicklighter's statement first, it is clear element No. 1 of the Dutton-Eaglin test was not satisfied since the statement clearly contained express assertions of past fact. Eaglin teaches, however, that a failure to satisfy this element does not automatically give rise to a Confrontation Clause violation. Indeed, the court in Eaglin, citing U.S. v. Snow,

521 F.2d 730 (9th Cir. 1975), cert. denied 423 U.S. 1090, 96 S.Ct. 883, 47 L.Ed.2d 101 (1976), stated that if only the second and third prongs of the test are satisfied, it can be held there is no violation of the right to confrontation.

Kicklighter's statement patently satisfies elements 2 and of the Dutton-Eaglin test, since Kicklighter clearly had personal knowledge of the participants' identities and there clearly was a remote possibility of faulty recollection. In this latter connection it is noted Kicklighter's statement was made to Officer Gendreau on the very day the events in question occurred. Even element 4 seems to be present in this case, i.e., there is no indication Kicklighter misrepresented petitioner's participation in the crime. With respect to this latter point, two comments are worthy of mention. First, the statement given by Kicklighter

closely paralleled petitioner's trial testimomy, and it is clear no effort was made by Kicklighter to lay the blame on petitioner. Second, Kicklighter's statement was also signed by his father, who was apparently present when the statement was given. (RT 359-362.) This additional fact serves to enhance the integrity of the statement that was given by Kicklighter.

Except for the fact Gutierrez' father was apparently not present when the former made his statement to Officer Gendreau, the application of the Dutton-Eaglin test is subject to the same analysis, and yields the identical result, as in the case of Kicklighter. It must be concluded, therefore, that the admission of neither Kicklighter nor Gutierrez' statements violated petitioner's constitutional right to confrontation. In light of the fact no Confrontation Clause

violation has been found, it is unnecessary to engage in constitutional harmlessness analysis. (U.S. v. Eaglin, supra, at p. 1809.)

Petitioner's next claim is that statements made by him to Officer Trinkler violated the mandate of Miranda v. Arizona, supra. The facts giving rise to this claim may be briefly summarized as follows:

After Officer Trinkler apprehended petitioner in some shrubbery shortly after the homicide was committed, and while he was escorting petitioner to the sidewalk, the following conversation, which was admitted over a Miranda, objection, took place between Trinkler and petitioner.

> All I said to him was, 'Why did you run?' He said, 'My two friends were going to rob this man' that he said he thought got out of a pickup truck. 'I didn't want to be associated in the

robbery.' Then I asked him who were the friends, what were the names of the friends that were involved in the robbery, and who cut the victim. He said that Ricky Gutierrez was the suspect that cut the victim and the other was Mike Kicklighter and he was the one that held the victim. At that time I observed that he had two fairly large blood stains on the front of his T-shirt and they were glistening, fresh, wet blood stain. I noted that when I got him out into the street light these blood stains existed on his clothing, and I asked him where he was. He said that he was in the middle of the street, watching from that point and that this was happening on the sidewalk, on the south sidewalk. At that point, I

determined that he was obviously --- there was a discrepancy in his story, being that the blood was fresh on his clothing. That's all I asked him." (RT 238-239.)

It has already been noted above that the Court of Appeal found, and respondent herein concedes, that the statement made by petitioner was admitted in violation of Miranda's mandate. The only question presented, therefore, is whether the admission of the statement was harmless beyond a reasonable doubt under the Chapman test.

It will be remembered that the Court of Appeal specifically found that this case had been improperly submitted to the jury on a premeditation and deliberation theory of first degree murder since there was insufficient evidence in the record to support an inference of premeditation or deliberation. It

necessarily follows, therefore, that the only basis for sustaining a first degree murder conviction was on a felony-murder theory. As has also been noted, the Court of Appeal found sufficient evidence in the record to support a first degree murder conviction based on that theory.

In California a murder committed in the perpetration of a robbery is murder in the first degree. (Penal Code §189.) In the present case it is clear, based upon the instructions given by the court (CT 66; 88; 89), that the only theory of first degree felony-murder which was submitted to the jury related to the taking of the decedent's property by Richard Gutierrez. Thus, the court specifically instructed:

> "If you find that Ricky Gutierrez did not form the intent to take property from Harry Hopkins until after the stabbing of the said Harry Hopkins -- if Ricky

Gutierrez did such act, then you are instructed that Harry Hopkins was not killed in the perpetration of, or an attempt to perpetrate, the crime of robbery, and as such it is not murder in the first degree under the felony murder rule." (CT 89.)

It is clear from the foregoing, therefore, that the point in time that Gutierrez formed the intent to rob the decedent was crucial to petitioner's conviction of first degree felony-murder. The only evidence which was introduced at petitioner's trial which directly related to Gutierrez' intent at the time he took the decedent's money was Kicklighter and Gutierrez' statements to Officer Gendreau, Kicklighter's preliminary hearing testimony

and petitioner's non-Mirandized statements to Officer Trinkler.3/

3/ It should be noted that the Court of Appeal stated that the "jury in the case at bar could have inferred a prior intent to rob Harry Hopkins from the fact that one of the individuals in Harry Hopkins' (sic) group had broken into a car previously, and the contents of the glove compartment were thrown out. This was sufficient to infer a general intent to steal on the part of the group prior to the killing." (Appendix to Return, Slip Op. p. 16.) Frankly, the Magistrate is not quite sure what the court meant by the term "a general intent to steal." In any event, assuming there is such a thing as a general intent to steal," the Magistrate does not see how such an intent can be translated into the specific intent required in California for the crime of robbery (CT 88), especially since the car incident occurred a number of minutes before the stabbing incident. Indeed, the record reflects that after the rock throwing incident petitioner and his companions went to a hospital to seek medical treatment. It was only after they left the hospital that the confrontation with Glen Greene, and then the decedent, occurred. To reiterate, the Magistrate believes that it stretches legal analysis to the breaking point to conclude that the fact a member of petitioner's group broke into an automobile some time earlier constituted evidence that Gutierrez intended to rob the decedent prior to the time the stabbing occurred.

In his statement Kicklighter stated that while David Harger and the decedent were fighting, Gutierrez took a wallet out of the decedent's pocket. Kicklighter further stated that after he and his friends, including petitioner, returned to Debbie Waller's apartment "Richard pulled the guy's wallet out and started counting it. Everybody was supposed to get $5, but he went to the store . . . ." (RT 364.) The only statement made by Kicklighter which would support an inference that the intent to rob the decedent arose prior to the stabbing was "Everybody was supposed to get $5." The Magistrate believes, however, that this statement is at best ambiguous and could have just as easily been interpreted to mean that when Gutierrez displayed the money, petitioner and Kicklighter each asked to receive $5.00. In any event, it is clear Kicklighter's statement contains

no express assertion that he, petitioner and Gutierrez intended to rob the decedent prior to the time petitioner stabbed him.

It should also be noted that Kicklighter's preliminary hearing testimony was read to the jury in this case. In this tetimony Kicklighter stated that during the fight involving the decedent and David Harger, and while petitioner was on the ground, "Rick got the wallet." (Preliminary Hearing Transcript, p. 43.) On cross-examination Kicklighter denied that Gutierrez had said anything to the effect of "Let's take a wallet." Rather, Kicklighter specifically testified that Gutierrez took the wallet on his own. (Preliminary Hearing Transcript, p. 55.) This testimony certainly does not lend support to the theory that the intent to rob arose prior to the stabbing.

Gutierrez' statement is even less supportive of a felony-murder theory.

Thus, he stated that "After the guy got stabbed in front of the apartment, I saw three $20 bills lying on the ground. I put the money in the baby's room in Debbie's apartment, in a chest of drawer. It's my wallet. All the money in that wallet is what I picked up. Russell Hinman and Mike Kicklighter wanted to go halves on the money, but I said no." (RT 366-367.)

It would seem that the most reasonable interpretation of Gutierrez' statement is that he did not decide to take the decedent's money until he saw it lying on the ground after the decedent was stabbed. Obviously, if this state of facts was believed, the jury could not have found petitioner guilty of first degree murder on a felony-murder theory.

It is with the foregoing in mind that the admission of petitioner's extra-judicial non-Mirandized statement must be examined. Thus, in this statement

petitioner, much more clearly than either of his companions, indicated that his two friends were going to rob the decedent and that he (petitioner) did not want to become involved. Although petitioner's statement in this regard appears to be exculpatory on its face, it must be noted that exculpatory statements are included within the Miranda rule. (Miranda v. Arizona, supra, 384 U.S. at p. 444.) More importantly, the jury was not required to believe petitioner's assertion that he did not wish to become involved in the robbery his two friends were going to commit. To the contrary, the jury could well have believed that Kicklighter, Gutierrez and petitioner intended to rob the decedent, petitioner's statement to the contrary notwithstanding.

It appears to the Magistrate, therefore, that the most clear indication that an intent to rob the decedent existed before the stabbing came from petitioner's

own non-Mirandized statement. Under such circumstances, the Magistrate is unable to state that the admission of this statement was harmless beyond a reasonable doubt. In this connection, as is pointed out by petitioner in his traverse, it can hardly be claimed the admission of petitioner's statement constituted harmless error since respondent himself has sought to utilize the statement in an effort to buttress a felony-murder theory of first degree murder. (Respondent's Return, p. 35.)

Based on the foregoing, the Magistrate has concluded petitioner is entitled to a writ of habeas corpus from this Court. In reaching this conclusion the Magistrate notes that petitioner has presented two other issues to the Court, namely, that the evidence was insufficient to sustain a conviction of first degree murder and that the court erred in giving a feloney-murder instruction to the jury. In

light of the fact a new trial will be necessary in this case in the event the Court adopts the Magistrate's recommendation herein, the Magistrate believes it would be inappropriate for the Court to make a determination as to these issues at this time since, on retrial, new evidence may be presented with respect to the felony-murder theory. The Magistrate would be remiss if he did not state, however, that if no new evidence is introduced on retrial with respect to such theory, the state should carefully consider the wisdom of requesting felony-murder instructions.

Based on the foregoing, IT IS RECOMMENDED that an Order be issued by the Court granting the petition for writ of habeas corpus.

Dated: January 30, 1978.

HARVEY A. SCHNEIDER
United States Magistrate

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner-Appellee v. D. J. McCARTHY, Superintendent, Respondent-Appellant.	No. 81-5051 D.C. No. CV 77-3012 WMB O R D E R

Appellant's Motion for Recall of the Mandate and for Stay of Mandate Pending Application to the United States Supreme Court for a Writ of Certiorari is denied.

United States Circuit Judge
J. CLIFFORD WALLACE

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL LEE HINMAN,	)	
	)	
Petitioner-Appellee,	)	
	)	No. 78-3005
vs.	)	
	)	ORDER FOR
D. J. McCARTHY,	)	REMAND
Superintendent,	)	
	)	
Respondent-Appellant.	)	
	)	

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and HUG, Circuit Judges, and INGRAM,*/ District Judge.

California appeals from the district court's judgment granting Hinman a

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*/ The Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

writ of habeas corpus, conditioned on the State failing to grant a new trial within 60 days. Hinman was convicted in California of first degree murder and of assault with a deadly weapon. The conviction was affirmed by a California Court of Appeal and the Supreme Court of California denied a hearing. His attempts to obtain relief by way of a writ of habeas corpus in the State courts were unsuccessful and he filed this application for the writ in the district court.

The matter was referred to a United States magistrate who presided at an evidentiary hearing and, by a report dated January 30, 1978, recommended that the writ be granted. The record contains nothing to indicate that the report was served on the State at that time. By order filed July 19, 1978, the district court adopted his recommendation, reciting:

> "The Court has reviewed the petition, the return, the records submitted therewith, the traverse, and the attached Report and Recommendation, and concurs with and adopts the findings and conclusions of the United States Magistrate."

Filed simultaneously with this order were the judgment and Magistrate's report. The judgment was entered on July 20, 1978 -- one day later.

The Magistrate's Act, as amended in 1977, permits a judge to designate a magistrate to conduct evidentiary hearings in habeas corpus matters brought by State prisoners. 28 U.S.C. §636(b)(1)(B). Subsection (C) provides that, "the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties." This language is followed by:

> "Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A Judge

> of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommedations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

These provisions clearly were not observed. The magistrate's report was filed only one day before entry of judgment, therefore precluding the filing of any objections that the State might have wished to make and thus also precluding any de novo determination by the district judge of the proposed findings or recommendations to which the State might have objected.

We are not disposed to speculate, as Hinman would have us do, that the State would not have made objections even if the opportunity have been afforded. The statute sets very clear limits on the scope of the magistrate's participation in habeas corpus proceedings. Those limits have been

exceeded here.

We remand to the district court to provide the State the opportunities guaranteed it by Section 636. In view of the remand, we will not address the other issues raised by the State. If another appeal is taken, those issued may then be raised anew.

Reversed and remanded for proceedings consistent herewith.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-267

D. J. McCARTHY, Superintendent, California Men's Colony,

Petitioner,

v.

RUSSELL LEE HINMAN,

Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI

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I. THE STATE OF CALIFORNIA HAS MOOTED THIS CASE BY ACCEPTING A PLEA OF GUILTY TO SECOND DEGREE MURDER AFTER FILING A PETITION FOR A WRIT OF CERTIORARI WITH THIS COURT.

A. STATEMENT OF FACTS

1. Respondent was convicted of first degree murder and assault with a deadly weapon after a jury trial held in the Superior Court, Los Angeles, California, in 1975.

2. On October 7, 1976, the California Court of Appeal, in affirming the conviction, held that the only basis for sustaining respondent's first degree murder conviction was on a felony-murder theory, since there was insufficient evidence of premeditation or deliberation. 676 F.2d at 350.

3. In order to sustain respondent's felony-murder conviction, the State had to prove that respondent's associates intended to rob the victim, that respondent was aware of their intention, and that he acted with an intent to assist them at the time he stabbed the victim. 676 F.2d at 350.

4. At trial, the State introduced, as part of its case-in-chief, an un-Mirandized statement of respondent, allegedly made in response to a question by a police officer after the incident, as follows:

> Q: "Why did you run?"
>
> A: "My two friends were going to rob this man . . . . I didn't want to be associated in the robbery." ([R.T., p. 238-239]

5. Respondent thereafter took the witness stand and admitted stabbing the victim, but denied intending to rob the victim at the time of the stabbing, and denied knowing his associates intended to rob the victim at the time of the stabbing. [R.T., p. 441-442]

6. Respondent denied making the alleged statement to the police officer. [R.T., p. 456]

7. The trial court admitted respondent's alleged statement, over defense counsel's objection, despite the absence of proper Miranda warnings. The California Court of Appeal found there was a violation of Miranda, but found the error to be harmless beyond a reasonable doubt. 676 F.2d at 345.

8. After respondent was denied a hearing by the California Supreme Court, he sought habeas corpus review of his conviction in Federal District Court.

9. On December 31, 1980, the Federal District Court found that respondent's statement, taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), was not harmless error beyond a reasonable doubt, granted the Petition for Writ of Habeas Corpus, and gave the State of California 120 days from the day its judgment became final to either discharge respondent or to institute proceedings for a new trial.

10. On January 22, 1981, the State filed a timely notice of appeal with the Ninth Circuit Court of Appeals.

/

11. On February 16, 1982, the Ninth Circuit affirmed the judgment of the District Court granting respondent's Petition for a Writ of Habeas Corpus. The Ninth Circuit's Opinion emphasized that the Writ was directed to the first degree murder conviction only, and had no effect upon the assault with a deadly weapon conviction. 676 F.2d at 352.

12. On May 11, 1982, the Opinion of the Ninth Circuit Court of Appeals was amended and the petition filed by the State of California asking for rehearing and suggesting a rehearing en banc was denied.

13. The Mandate of the Ninth Circuit Court of Appeals was issued on May 21, 1982.

14. The Judgment of the Court of Appeals was filed and spread by the District Court on May 26, 1982, which meant that the State of California had 120 days from May 26, or until September 23, 1982, to either discharge respondent or to institute proceedings for a new trial.

15. On June 6, 1982, the State of California filed a Motion for Stay of Mandate in the Ninth Circuit Court of Appeals. On June 9, 1982, the petitioner, State of California, filed a Motion for Recall of the Mandate and for Stay of the Mandate Pending Application to the United States Supreme Court for Writ of Certiorari.

16. On June 28, 1982, the Ninth Circuit Court of Appeals denied petitioner's Motion for Recall and Stay of the Mandate.

/

17. On August 2, 1982, the State of California filed an Application for Stay of Enforcement of Judgment pending the filing of a Petition for Writ of Certiorari with this Court. At the conclusion of the State's application for a stay, the State made the following statement:

> " . . . should our request for a stay be denied, retrial of respondent could deny California an opportunity to have this Court resolve the very important issues raised by this case."
> [Application for Stay, page 10]

18. On August 9, 1982, the State of California filed with this Court a Petition for Writ of Certiorari.

19. On August 16, 1982, this Court denied the State's Application for Stay of Enforcement of Judgment pending the filing of a Petition for Writ of Certiorari.

20. On October 14, 1982, the State of California accepted a plea of guilty from respondent to a charge of second degree murder before Judge Sheila Pokras, Los Angeles County Superior Court, Department South J, Long Beach, California. The docket sheet and the reporter's transcript of this guilty plea are attached hereto and incorporated herein as Appendices A and B. Sentencing is set for November 29.

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/

/

B. ARGUMENT

Respondent respectfully submits that the State of California, through its own actions, has mooted the Petition for Certiorari currently pending before this Court by electing to accept from respondent a guilty plea to the lesser included offense.

The State of California has maintained a single position on the single critical issue in this case for more than six years. That position may be summarized as follows:

1. The first degree murder conviction should be sustained because admission of respondent's statement was harmless error.

2. The error was harmless error because " . . . there was overwhelming evidence, apart from the tainted evidence, to support respondent's conviction under a theory of felony-murder." [Petition for Writ of Certiorari, p. 35]

Yet, when faced with the prospect of re-trying respondent without the tainted statement, the State has now accepted a plea of guilty from respondent to second degree murder. This leaves the State of California in the position of petitioning this Court to reinstate a first degree murder conviction after accepting a plea of guilty from the respondent to second degree murder in the same case.

/

The conduct of the State of California in so doing raises fundamental questions quite apart from the ethical and legal issues raised by the State attempting to back out of a plea bargain after a criminal defendant has pleaded guilty.

If petitioner was willing to accept a conviction for second degree murder, either by plea or after a retrial, it should never have challenged the opinion of the Ninth Circuit Court of Appeals by filing a Petition for a Writ of Certiorari in this Court.

Having filed such a Petition with this Court, and then accepting a plea of guilty to second degree murder, the State should now in good faith move to withdraw its Petition for a Writ of Certiorari.

If the State of California fails to so move, it is respectfully suggested that this Court should decline to rule on what are certainly very interesting points of law, but nevertheless points of law which have nothing to do with any current controversy between the People of the State of California and Mr. RUSSELL LEE HINMAN.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

II. THIS CASE IS NOT AN APPROPRIATE ONE FOR REVIEW ON THE ARTICLE III ISSUE BECAUSE THE FACTS OF THIS PARTICULAR CASE DO NOT CLEARLY FRAME THE ISSUES RAISED BY THE PETITION.

A. STATEMENT OF FACTS

1. On August 8, 1977, respondent filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California.

2. On August 12, 1977, the magistrate to whom the case was assigned ordered that the State of California file a Return to the Petition for Writ of Habeas Corpus.

3. On September 6, 1977, the State filed a Return which included a Statement of Facts and Memorandum of Points and Authorities, and which attached the California Court of Appeal's Opinion as an appendix. The State also lodged with the magistrate at this time the clerk's transcript and the reporter's transcript from the trial proceedings.

4. On October 18, 1977, Karen R. Smith, Deputy Federal Public Defender, was appointed by the magistrate to represent respondent.

5. On December 5, 1977, respondent filed a Traverse in response to the State's Return.

6. On December 15, 1977, the magistrate notified both parties that the matter was set for oral argument on January 11, 1978.

7. On January 11, 1978, oral argument was heard by the magistrate. No witnesses were called by either side.

8. On January 30, 1978, the magistrate completed and signed his report and recommendation on the Petition for Writ of Habeas Corpus.

9. On July 19, 1978, United States District Judge William Matthew Byrne, Jr., filed an Order concurring with and adopting the findings and conclusions of the magistrate, and ordering a Writ of Habeas Corpus to Issue within 60 days, unless the State should, in the interim, elect to "institute proceedings for a new trial." Attached to the Court's Order and Judgment was a copy of the report and recommendation of the magistrate.

10. On July 20, 1978, Judge Byrne entered the formal Judgment on his Order of the previous day.

11. On August 10, 1978, the State of California filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals.

12. On October 9, 1979, the Ninth Circuit remanded the case to Judge Byrne because the Magistrate's Act had not been complied with in the following particulars:

(a) A copy of the magistrate's proposed findings and recommendations had not been mailed to all parties.

(b) The State had not been given an opportunity to respond and to file written objections to the magistrate's proposed findings and recommendations;

(c) Judge Byrne had failed to "make a de novo determination of those portions of the report or

specified proposed findings or recommendations to which objection is made" 1/ prior to entering his Order and Judgment.

13. On November 2, 1979, the State filed with Judge Byrne written objections to the report and recommendation of the magistrate.

14. On April 4, 1980, Judge Byrne heard oral argument on the State's written objections to the report and recommendation of the magistrate.

15. On December 31, 1980, Judge Byrne filed a new Order, pursuant to 28 USC §636(b)(3) granting the Petition for a Writ of Habeas Corpus and again ordering the Writ to Issue, unless within 120 days of the District Court's Judgment, the State should elect to "institute proceedings for a new trial." 2/ In so doing, Judge Byrne made it clear that he had conducted a de novo review of the magistrate's findings, and that "the ultimate decision" had been his alone. 3/

1/ See Order for Remand, attached hereto and incorporated herein by reference as Exhibit C, page 2.

2/ See Judge Byrne's Order, attached hereto and incorporated herein by reference as Exhibit D.

3/ Ibid., page 2.

B. ARGUMENT

In the Petition for Writ of Certiorari, petitioner states that:

> " . . . Legal practitioners involved in habeas corpus matters brought under Section 2254 are painfully aware of the difficulties of conducting evidentiary hearings in habeas corpus cases where the facts are stale, witnesses difficult to locate and, when they are found, their memories dimmed by the passage of time. In this respect, the personal observation of an Article III judge of a witness' demeanor takes on greater siginificance than that of a suppression hearing which would be more contemporaneous to the events."
> [Petition for a Writ of Certiorari at Page 33-34]

Petitioner's legal argument is persuasive, but it has no application whatsoever to the facts of this case. While it is true that an evidentiary hearing was held before the magistrate to whom the district court judge initially assigned the case, neither the State nor respondent called any witnesses to testify before the magistrate. Therefore, the lack of the district court judge's opportunity to make a personal observation of a witness' demeanor has no significance whatsoever in this case. Furthermore, if the State had felt it necessary to have an Article III judge make a personal observation of the demeanor of witnesses, the State had every opportunity to have Judge Byrne do so when, after remand by the Ninth Circuit, Judge Byrne held a de novo evidentiary hearing on the State's objections to the findings and recommendations of the magistrate.

The State goes on at some length to make the following points in its Petition for a Writ of Certiorari:

(1) "Article III was created for the very purpose of protecting the State's right to be heard before a particular tribunal." pp. 22-23;

(2) " . . . The essential independence of the exercise of the judicial power of the United States . . . requires that the Federal court should determine [a constitutional] issue upon its own record and the facts elicited before it" [and not upon a record developed before a magistrate]. p. 25;

(3) The "stenographic transcript" developed before a magistrate, "is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." p. 26.

In making the above-mentioned points, the State of California implies to this Court that it has been deprived of the independent judgment of an Article III judge who acted only after developing his own record.

Once again, however, this very telling and colorful rhetoric simply fails to apply to the facts of this case. After this case was remanded to him by the Ninth Circuit for a complete de novo determination of the magistrate's findings, Judge Byrne gave the State of California an ample opportunity to develop an independent record before an Article III judge through an evidentiary hearing.

/

It was only after the hearing of April 4, 1980, at which time he developed his own independent record, that Judge Byrne acted to grant respondent's petition.

This Court will search in vain for any reference to the April 4 hearing in the Petition for a Writ of Certiorari.

For these reasons, should this court wish to address the Article III issue in light of the Magistrate's Act of 1976, this particular case may not be the best vehicle toward that purpose.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

III. THE FEDERAL HABEAS COURT PROPERLY REVIEWED THE CONSTITUTIONAL SIGNIFICANCE OF RESPONDENT'S STATEMENT OBTAINED IN VIOLATION OF MIRANDA v. ARIZONA, 384 U.S. 436 (1966).

Petitioner correctly states that a federal habeas court is restrained by statute and case law in the manner in which it may review state court findings of fact. Petitioner, however, asserts that the federal habeas court, and in turn the Ninth Circuit Court of Appeals, must have ignored the state court findings of fact in the instant case. Respondent respectfully submits that the record reflects that the federal habeas court and the Circuit Court of Appeals reviewing the lower court record respected the factual findings of the California Court of Appeal and properly analyzed those facts under the dictates of Chapman v. California, 386 U.S. 18 (1967).

It is noteworthy that petitioner ignores the existence of Chapman, 386 U.S. 18 (1967), and implicitly denies that the Miranda error found by the California Court of Appeal was in fact federal constitutional error. Respondent contends that the admission of his statement obtained by the police in violation of Miranda v. Arizona, 384 U.S. 436 (1966), was federal constitutional error, the dimension of which was correctly determined by application of Chapman, 386 U.S. at 24.

That a federal habeas court is restrained in its review of state court factual findings by Title 28 USC §2254(d) is well settled. See Sumner v. Mata, 449 U.S. 539 (1981). Petitioner asserts, however, that a federal habeas court should accept as "presumptively correct" the state court

finding that admission of the tainted statement at trial was "harmless beyond a reasonable doubt." (Petition for Writ of Cert., p. 36). There is no authority for such a proposition. As the United States Supreme Court observed in Townsend v. Sain, 372 U.S. 293 (1963):

> "By 'issue of fact' we mean to refer to what are termed basic, primary or historical facts: facts in the sense of a recital of external events and the credibility of their narrators . . . "
> 372 U.S. at 309.

Thus, a determination of "harmless error" is not a determination of fact but a legal conclusion. A federal habeas court may give different weight to facts as found by the state court and may reach a different conclusion in light of the applicable legal standards. Moreover, a mixed determination of law and fact requires the application of legal principles to historical facts. See Cuyler v. Sullivan, 446 U.S. 335, 342 (1980); Sumner v. Mata, —U.S.—, 102 S. Ct. 1303 at 1306, 1307 (1982).

In the instant case, the federal habeas court and the Circuit Court of Appeal upon review disturbed no factual findings made by the state. 4/ Instead, the federal habeas court applied the Chapman test in order to determine

---

4/ In the Amendment of Opinion and Denial of Rehearing, the 9th Circuit Court of Appeals amended footnote 3 of its February 16, 1982 opinion to read "Thus, no finding of fact by the state jury or finding accepted by the California Court of Appeal is being reviewed." (Petitioner's Appendices, App. B, p. 2)

whether it could be concluded beyond a reasonable doubt that the Miranda error did not materially affect the verdict.

Respondent's tainted statement was the only unambiguous evidence showing he knew of his friends' intention to rob; neither the statement of crime partner Kicklighter nor that of Gutierrez indicates (1) a prior-existing agreement to rob, and (2) respondent's knowledge of that plan. Thus, respondent's tainted statement provided the strongest evidence of the plan to rob required to sustain a felony-murder conviction. In light of such evidence, the federal habeas court and the Circuit Court of Appeal weighed the evidence of felony-murder provided by the state court factual findings and found them wanting under Chapman. 5/

Petitioner attempts to minimize the devasting impact of the admission of respondent's tainted statement by focusing upon the possible exculpatory interpretation of the statement. The seminal case of Miranda v. Arizona, supra, addresses the fallacy of this position:

> "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.

5/ The paltry nature of the evidence of felony murder without benefit of the tainted statement has been attested to by the State of California's decision to accept a plea by respondent to murder in the second degree. (See Argument 1, p. 5-6)

> Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement were in fact truly exculpatory it would, of course, never be used by the prosecution."
>
> 384 U.S. 436 at 476-477 (1965). (Emphasis added).

Respondent's statement provided the clearest evidence of prior intent to rob and was the centerpiece of the prosecution felony-murder theory. The prejudice of its admission at trial was overwhelming. The federal habeas court properly concluded that the Miranda error was not harmless beyond a reasonable doubt.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

IV. THE TRIAL RECORD ESTABLISHES THAT THE TAINTED STATEMENT WAS ERRONEOUSLY ADMITTED IN THE PROSECUTION CASE IN CHIEF AND THEREFORE IS NOT GOVERNED BY THE DICTATES OF HARRIS v. NEW YORK, 401 U.S. 227 (1971).

Petitioner frames the issue in Argument III of its Petition regarding the admission of respondent's non-Mirandized statement in such a way as to obfuscate an otherwise straightforward record. Petitioner asserts that since under federal case authority of Harris v. New York, 401 U.S. 222 (1971), statements obtained in violation of Miranda v. Arizona, supra, can still be admitted for impeachment purposes, the federal habeas court should have considered "the impeaching effect of respondent's non-Mirandized statement in resolving whether its introduction was harmless beyond a reasonable doubt." (Petition for Writ of Cert., page 42).

Although petitioner's recitation of the law is sterling, its application to the instant facts is flawed. The record below is clear that respondent's statement was introduced in the prosecution case-in-chief and even petitioner concedes that a limiting instruction "should have been given" if impeachment were intended. (Petition for Writ of Cert., pp. 42-43). Absent such an instruction, the jury was free to consider the tainted statement as evidence of guilt. Therefore, it is at best wishful thinking for petitioner to discuss respondent's tainted statement in terms of "impeachment." In reality, the statement was introduced as substantive evidence of guilt arguably showing respondent's

prior knowledge of the planned robbery. Such a move by the prosecution compelled respondent to testify in order to clarify the statement and mitigate its prejudice to him. By no stretch of the imagination does such a sequence of events describe any known species of impeachment.

Thus, petitioner does not present a real issue to this Court but rather poses a hypothetical issue of what might be the legal consequences if the tainted statement had been admitted under different circumstances. The federal habeas court properly dealt with the actual state of the record and accordingly disposed of this illusory issue. Therefore, the harmless error analysis of the federal habeas court was valid.

For the foregoing reason, the Petition for Writ of Certiorari should be denied.

V. CONCLUSION

Petitioner has not raised meritorious issues for review by this Court. Accordingly, it is respectfully urged that petitioner's Petition for Writ for Certiorari be denied.

Respectfully submitted,

KAREN R. SMITH
Attorney for Defendant-Appellant

JAMES R. DUNN
Federal Public Defender

By _____
PETER M. HORSTMAN
Chief Deputy Federal Public Defender

Of Counsel

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-267

D. J. McCARTHY, Superintendent, California Men's Colony,

Petitioner,

v.

RUSSELL LEE HINMAN,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 1982, a copy of Response to a Petition for a Writ of Certiorari was mailed postage prepaid, to Shunji Asari and Owen Lee Kwong, Deputy Attorneys General, 3580 Wilshire Boulevard, Room 800, Los Angeles, CA 90010, counsel for the Petitioner.

JAMES R. DUNN
Federal Public Defender

By _____
PETER M. HORSTMAN
Chief Deputy Federal Public Defender

2 TRL/MOT — SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT. SOUTH

OCTOBER [redacted] 1975

HONORABLE SHEILA F PONDAS JUDGE — DEPT. D H LUTZ

201 R KING Deputy Sheriff — G ALDRIDGE Deputy Clerk / Reporter

CASE NO. A015821

(Parties and counsel checked if present)

Counsel for People: J COSPER

Deputy District Attorney: G JONES

Counsel for Defendant: J GALLAGHER DPD

CHARGE: 01 HINMAN RUSSELL LEE — 187 — 01CTS — 246.A — [redacted]

(BOX CHECKED IF ORDER APPLICABLE)

NATURE OF PROCEEDINGS

31 ☐ TRIAL — TRIAL REN — 42nd DAY — 07-14-75

32 ☐ ..... IS SWORN AS THE ENGLISH ..... INTERPRETER

33 ☐ DUE TO CONFLICT OF INTERESTS, PUBLIC DEFENDER RELIEVED, PURSUANT TO SECTION 987.2 PENAL CODE ..... IS APPOINTED

34 ☐ ON PEOPLE'S MOTION, AMENDMENT TO/AMENDED INFORMATION FILED/DEEMED FILED/INFORMATION AMENDED BY INTERLINEATION/AS FOLLOWS .....

35 ☐ ON ..... MOTION: CASE A ..... CONSOLIDATED INTO CASE A ..... AS COUNT(S) ..... THEREOF. SEE CASE A ..... FOR FURTHER PROCEEDINGS

36 ☐ MOTION PURSUANT TO SECTION 995 PENAL CODE GRANTED/DENIED/WITHDRAWN/CONTINUED TO .....

37 ☐ MOTION PURSUANT TO SECTION 1538.5 PENAL CODE CALLED FOR HEARING ☐ MOTION SUBMITTED PER STIPULATION (NO. 41) BELOW

38 ☐ DEFENDANT ADVISED OF CONSTITUTIONAL RIGHTS AND EFFECT OF PRIOR CONVICTIONS, WAIVES RIGHTS, ADMITS PRIOR(S): NO .....

39 ☒ CAUSE IS CALLED FOR TRIAL ☐ CAUSE SUBMITTED PER STIPULATION (NO. 41) BELOW

40 ☒ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TRIAL BY JURY and Court ..... COURT ACCEPTS WAIVER

41 ☐ By stipulation of defendant and all counsel cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to the court's rulings, with each side reserving the right to offer additional evidence and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that all exhibits received or marked for identification at the preliminary hearing are received in evidence and marked for identification in these proceedings, bearing the same number as used in the preliminary hearing, subject to the court's rulings. People's exhibit ..... (Preliminary Transcript) admitted into evidence by reference .....

42 ☒ Defendant advised and personally waives his right to confrontation of witnesses for the purpose of further cross-examination, and waives privilege against self-incrimination. Defendant advised of possible effects of plea on any alien or citizenship status

43 ☐ THE COURT STATES IT HAS READ AND CONSIDERED THE TRANSCRIPT OF THE PRELIMINARY HEARING

44 ☐ .....

45 ☐ ALL SIDES REST. COUNSEL WAIVE ARGUMENT/AROUS AND CAUSE IS SUBMITTED

46 ☐ MOTION PURSUANT TO SECTION 1538.5 PENAL CODE GRANTED/DENIED/WITHDRAWN/CONTINUED TO .....

47 ☐ COURT FINDS DEFENDANT NOT GUILTY .....

48 ☐ COURT FINDS DEFENDANT GUILTY AS CHARGED TO SECTION(S) ..... IN COUNT(S) ..... ☐ LESSER INCLUDED/RELATED OFFENSE

49 ☐ PRE TRIAL CONFERENCE HELD/OFF CALENDAR/CONTINUED TO .....

50 ☐ ☐ THE DEFENDANT ☐ THE PEOPLE ANNOUNCE(S) READY FOR TRIAL

51 ☐ THE COURT, DUE TO CONGESTED CALENDAR, TRAILS TRIAL ..... TO .....

52 ☐ ON ..... MOTION, TRIAL ..... IS SET/CONTINUED TO/REMAINS ..... AT ..... A.M. IN DEPT ..... REASON .....

53 ☐ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TIME FOR TRIAL

54 ☐ CAUSE TRANSFERRED TO DEPT ..... ☐ FORTHWITH ☐ ON ..... AT ..... A.M. FOR .....

55 ☐ DEFENDANT/WITNESS(ES) INSTRUCTED TO RETURN ON ABOVE DATE .....

56 ☒ DEFENDANT PERSONALLY WITHDRAWS PLEA OF NOT GUILTY TO COUNT(S) ..... REARRAIGNED

57 ☒ PLEADS GUILTY/~~NO CONTENDERE~~ WITH CONSENT OF DISTRICT ATTORNEY AND APPROVAL OF COURT TO VIOLATION OF SECTION(S) 187 PC, second degree IN COUNT(S) I ☐ LESSER INCLUDED/RELATED OFFENSE

58 ☒ DEFENDANT REFERRED TO PROBATION DEPARTMENT. ☒ DEFENDANT WAIVES TIME FOR SENTENCE PROBATION AND SENTENCE HEARING SET 11-29-82 AT 9 A.M. IN DEPARTMENT SOF INCLUDING

☐ DISPOSITION OF COUNTS ..... REMAINING

☐ DETERMINATION OF PRIORS ALLEGED/DEGREE/ARMED/USE/GREAT BODILY INJURY ALLEGATION

59 ☐ DEFENDANT WAIVES PROBATION REFERRAL, REQUESTS IMMEDIATE SENTENCE. (SEE SENTENCE BELOW/SEE ATTACHED SHEET)

60 ☐ FURTHER ORDER AS FOLLOWS .....

61 ☐ THE SHERIFF IS ORDERED TO ALLOW THE DEFENDANT ..... TELEPHONE CALLS AT DEFENDANT'S OWN EXPENSE

62 ☐ DEFENDANT FAILS TO APPEAR WITH/WITHOUT SUFFICIENT EXCUSE ☐ BAIL FORFEITED ☐ O.R. REVOKED

63 ☐ BENCH WARRANT ORDERED ISSUED/AND HELD UNTIL ..... NO BAIL/BAIL FIXED AT $ .....

64 ☐ DEFENDANT APPEARING, BENCH WARRANT ORDERED RECALLED/QUASHED ( ) RECALL NO ..... WRITTEN ( ) ABSTRACT FILED

65 ☐ UPON PAYMENT OF $ ..... COSTS BEFORE ..... AND FILING OF REASSUMPTION, ORDER OF ..... FORFEITING BAIL IS TO BE VACATED AND BAIL REINSTATED

66 ☐ REASSUMPTION FILED/COSTS PAID (RECEIPT NO .....) ORDER OF ..... FORFEITING BAIL VACATED, BAIL REINSTATED

67 ☐ DEFENDANT'S MOTION FOR RELEASE ON O.R./REDUCTION OF BAIL IS GRANTED/DENIED

68 ☐ BAIL RESET AT $ .....

☒ REMANDED ☐ BAIL ☐ BAIL EXONERATED ☐ BOND NO .....

RECEIVED

NOV 01 [illegible]

OFFICE OF THE
FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA

FILED
OCT 27 1982
JOHN A. CORGORAN, County Clerk
BY: J. E. [illegible], DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT S.O.J. HON. SHEILA F. POKRAS, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs. [redacted] No. A015821
RUSSELL LEE HINMAN, GUILTY PLEA
Defendant.

LONG B[illegible]CH, CALIFORNIA; THURS. OCTOBER 14, 1982; 11:50 A.M.

Upon the above date, the defendant being present in court represented by counsel, J. GALLAGHER, Deputy Public Defender; People being represented by J. COSPER, Deputy District Attorney; the following proceedings were held:

(Gloria Aldridge, Official Reporter)

MR. GALLAGHER: Does the court wish me to make this an 1192.5 offer? That way the court has the option -

THE COURT: Yes, conditional plea.

MR. GALLAGHER: Your Honor, the defendant Russell Hinman

will plead guilty to second degree murder under 1192.5 Penal Code. The case of course was 1975.

MR. COSPER: For the record, your Honor, perhaps we should explain some of the procedural background behing this case. Mr. Hinman was involved in a homicide back on the 19th of June, 1975, ultimately convicted of murder in the first degree in Judge Mullendore's court in November of 1975.

In December of 1975 the defendant was sentenced to state prison for a life sentence on first degree murder. Count II, assault with a deadly weapon, was ordered to run concurrent. The sentence becoming final upon completion of his sentence on the first degree murder conviction.

The California Court of Appeals affirmed the conviction. The California Supreme Court denied a hearing and the defendant ran a writ of habeas corpus in Federal District Court, they reversed the defendant's murder conviction.

The Ninth Circuit Court of Appeals affirmed that reversal instructing the defendant to be brought back and re-tried for murder.

At this time, there is a petition for writ of certiorari pending in U.S. Supreme Court and this plea is taken to a second degree murder being conditioned upon action or inaction by the U.S. Supreme Court. It is my understanding that sentencing will be in Department F in 45 days and if the Supreme Court grants the People's petition or grants the People's writ of certiorari and stays the proceedings the defendant will be returned to state prison on the first degree murder conviction.

If the Supreme Court denies hearing or denies People's petition the second degree murder conviction to which the defendant is entering his plea today will be in essence put into effect within 45 days the defendant to be sentenced in 45 days in Department F and we shall have some indication from the Supreme Court within 45 days whether any action is being taken or not. If no action has taken place the court would have the discretion to withdraw the defendant's plea of guilty and we'd set it back down for trial in the normal 60 day time limitations. Is that correct, Mr. Gallagher?

MR. GALLAGHER: That's correct.

THE COURT: Is that agreeable?

MR. GALLAGHER: Yes.

MR. COSPER: Mr. Hinman, do you understand what I have explained?

THE DEFENDANT: Yes.

MR. COSPER: You have had an opportunity to discuss this with your attorney, Mr. Gallagher?

THE DEFENDANT: Yes.

MR. COSPER: Is that what you wish to do, sir?

THE DEFENDANT: Yes.

MR. COSPER: Mr. Hinman in information A015821 you are charged with murder. Before the court can accept your plea of guilty to murder in the second degree I want to advise you of your constitutional and statutory rights as well as the consequences of your plea.

By pleading guilty you will be giving up certain rights including the right to jury trial. You already know

what a jury trial is but let me explain to you briefly. It is a trial in front of 12 members of the community selected by your attorney, Mr. Gallagher, and myself. They would sit in a jury box like the one behind me, listen to all of the evidence. To convict you they must agree unanimously People have proven your guilt beyond a reasonable doubt. If they are to acquit you, find you not guilty, they must also agree unanimously People have failed to prove your guilt beyond a reasonable doubt. By pleading guilty, Mr. Hinman, you will be giving up your right to jury trial.

You will also be giving up your right to confront and cross examine witnesses at that trial which means you have a right to be present in court throughout the entire trial and through your attorney, Mr. Gallagher, ask questions of all the witnesses that would testify. By pleading guilty you would be giving up that right also.

You would be giving up the power of the court to bring in witnesses to testify in your own behalf.

Finally, you are giving up your privilege against self-incrimination. This means you nave a right to remain absolutely silent throughout the entire proceedings. The fact of your silence cannot be held or used against you in any manner.

Do you understand these rights, Mr. Hinman?

THE DEFENDANT: Yes.

MR. COSPER: Do you understand by pleading guilty you will be giving up each of these rights?

THE DEFENDANT: Yes.

MR. COSPER: With regard to the consequences of your plea they have been explained to you basically. Murder in the second degree as the law was back in 1975 carries a sentence of 15 years to life.

MR. GALLAGHER: That's current law.

MR. COSPER: Carries a sentence of five years to life. No promises are being made to you concerning sentencing so in 45 days when you are returned before Judge Kelly he will either sentence you to state prison for five years to life or will allow you to withdraw your plea of guilty of the Supreme Court has taken no action by that day and set the matter back down for trial within 60 days. Do you understand that, Mr. Hinman?

THE DEFENDANT: Yes.

MR. COSPER: Having the consequences of your plea in mind is it still your desire to plead guilty?

THE DEFENDANT: Yes.

MR. COSPER: Mr. Hinman as indicated you are charged with murder. It is alleged on or about the 19th day of June, 1975 in the State of California, County of Los Angeles, you did willfully and unlawfully and feloniously with malice aforethought murder Harry Hopkins, a human being. Do you understand what you are charged with in count I of the Information, sir?

THE DEFENDANT: Yes.

MR. COSPER: Is the charge true?

THE DEFENDANT: Yes.

MR. COSPER: Mr. Hinman to information A015821 charging

you with murder in the second degree a felony, how do you now plead?

THE DEFENDANT: Guilty.

MR. COSPER: Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes.

MR. COSPER: Counsel join in the plea, concur in the waivers?

MR. GALLAGHER: I do.

THE COURT: The court will make a finding Mr. Hinman has knowingly, intelligently and voluntarily waived his constitutional rights. The court will enter the judgment.

At this time we will set P&S date November 29, Department South F at 9 o'clock.

MR. GALLAGHER: With the understanding if we get a decision from the Supreme Court earlier we can advance it.

MR. COSPER: I did indicate to Mr. Gallagher and I will indicate to Mr. Hinman that if any action occurs from the Supreme Court between this date and the 29th of November Mr. Gallagher will be notified immediately, Mr. Hinman will be returned to this court for further proceedings.

THE COURT: We do want a probation report rendered for that date?

MR. GALLAGHER: Yes.

THE COURT: Thank you, Mr. Hinman.

MR. COSPER: He's been sentenced on count II.

THE COURT: He's already been sentenced on the 245(a)?

MR. COSPER: He's been sentenced on the 245(a). That just goes along.

MR. GALLAGHER: That wasn't reversed.

MR. COSPER: The conviction was affirmed.

THE COURT: He is serving time on the 245(a).

MR. GALLAGHER: Yes.

THE COURT: Thank you, sir.

MR. COSPER: Thank you, your Honor.

- - - - - - - - - - - - -

REPORTER'S CERTIFICATE

I, Gloria Aldridge, Official Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing original, signed reporter's transcript is a true and correct transcript of all of the admonitions given and waivers and admissions taken at the time of the taking of the plea in the above-entitled cause.

Dated this 26th day of October, 1982.

Gloria Aldridge
OFFICIAL REPORTER CSR 1178

FILED

OCT 9 1979

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL LEE HINMAN,

Petitioner-Appellee,

vs.

D. J. McCARTHY, Superintendent,

Respondent-Appellant.

No. 78-3005

ORDER FOR REMAND

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS and HUG, Circuit Judges, and INGRAM,* District Judge.

California appeals from the district court's judgment granting Hinman a writ of habeas corpus, conditioned on the State failing to grant a new trial within 60 days. Hinman was convicted in California of first degree murder and of assault with a deadly weapon. The conviction was affirmed by a California Court of Appeal and the Supreme Court of California denied a hearing. His attempts to obtain relief by way of a writ of habeas corpus in the State courts were unsuccessful and he filed this application for the writ in the district court.

The matter was referred to a United States magistrate who presided at an evidentiary hearing and, by a report dated January 30, 1978, recommended that the writ be granted. The record contains nothing to indicate that the report was served on the State at that time. By order filed July 19, 1978, the district court adopted his recommendation, reciting:

*The Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

"The Court has reviewed the petition, the return, the records submitted therewith, the traverse, and the attached Report and Recommendation, and concurs with and adopts the findings and conclusions of the United States Magistrate."

Filed simultaneously with this order were the judgment and Magistrate's report. The judgment was entered on July 20, 1978 -- one day later.

The Magistrate's Act, as amended in 1977, permits a judge to designate a magistrate to conduct evidentiary hearings in habeas corpus matters brought by State prisoners. 28 U.S.C. §636(b)(1)(B). Subsection (C) provides that, "the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties." This language is followed by:

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A Judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

These provisions clearly were not observed. The magistrate's report was filed only one day before entry of judgment, therefore precluding the filing of any objections that the State might have wished to make and thus also precluding any de novo determination by the district judge of the proposed findings or recommendations to which the State might have objected.

We are not disposed to speculate, as Hinman would have us do, that the State would not have made objections even if the opportunity had been afforded. The statute sets very clear limits on the scope of the magistrate's participation in habeas corpus proceedings. Those limits have been exceeded here.

00129

We remand to the district court to provide the State the opportunities guaranteed it by Section 636. In view of the remand, we will not address the other issues raised by the State. If another appeal is taken, those issued may then be raised anew.

Reversed and remanded for proceedings consistant herewith.

00130

ENTERED

DEC 31 1980

CLERK, U S DISTRICT COURT
CENTRAL DISTRICT OF CA[illegible]
BY DEPUTY

FILED

DEC 31 1980

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUSSELL LEE HINMAN, Petitioner, v. D. J. McCARTHY, etc., Respondents.	CV 77-3012-WMB ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C.A. § 636(b)(3) (West Supp. 1980), attached is the Report and Recommendation of the United States Magistrate who has reviewed the petition filed herein for issuance of a writ of habeas corpus.

The Court has reviewed the petition, the return, the records submitted therewith, the traverse, ad the attached Report and Recommendation; it has further reviewed the respondent's Objections to the Magistrate's Report and Recommendation and the petitioner's Response to Respondent's Objections.

The Supreme Court has now held that the delegation of power to magistrates to make proposed findings and recommendations, which shall be subjected to a de novo determination by the district judge, does not violate Article III of the Constitution. See

United States v. Raddatz, 100 S. Ct. 2406, 2415-16 (1980). This district, therefore, did not violate the Constitution in delegating fact-finding and recommendation functions in habeas corpus proceedings, pursuant to the Federal Magistrates Act, 28 U.S.C.A. § 636(b)(1) (West Supp. 1980), because "the ultimate decision" is still made by this Court. Raddatz, 100 S. Ct. at 2416.

Respondent's challenge to the constitutionality of 28 U.S.C. § 2254 (1976), which provides federal habeas corpus relief for persons in state custody, is without merit. It is well-settled that federal district courts have jurisdiction to issue writs of habeas corpus after the prisoner in state custody has exhausted his state remedies. See, e.g., Rose v. Mitchell, 99 S. Ct. 2993, 3003 (1979); Jackson v. Virginia, 99 S. Ct. 2781, 2790 (1979); Wainwright v. Sykes, 433 U.S. 72, 78-81, 97 S. Ct. 2497, 2502-03; Stone v. Powell, 428 U.S. 465, 494 n.37, 96 S. Ct. 3037, 3052 n.37 (1976); Preiser v. Rodriguez, 411 U.S. 475, 485-94, 93 S. Ct. 1827, 1834-39 (1973). Because the petitioner has exhausted his state remedies, federal habeas relief is appropriate because the conviction was obtained in violation of his constitutional rights.

The Court concurs with the Magistrate's determination that there was insufficient evidence of specific intent to commit the offense of stealing, the felony that is requisite to support the conviction based on the felony-murder doctrine, absent the petitioner's statement, which was obtained without the warnings mandated by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). Because the only basis for sustaining the first-degree murder conviction was the felony-murder theory, and because there is insufficient constitutionally-obtained evidence of an underlying

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felony to support a conviction on that theory, the Magistrate was correct in concluding that the improper admission of the petitioner's statement was not harmless error within Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726 (1969).

Therefore, the Court concurs with and adopts the findings and conclusions of the United States Magistrate.

Accordingly,

IT IS ADJUDGED as follows:

1. That petitioner was convicted in violation of the Constitution of the United States.

2. That petitioner is entitled to a writ of habeas corpus from this Court.

IT IS ORDERED that a writ of habeas corpus will issue unless the respondent and the State of California shall, within 120 days from the date the Court's Judgment becomes final, institute proceedings for a new trial.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Order, the Judgment, and the Report and Recommendation of the United States Magistrate, by United States mail, on the petitioner, petitioner's counsel, the Attorney General of the State of California, and on the Presiding Judge of the Superior Court of the State of California for the County of Los Angeles.

DATED: 30 December, 1980

Wm. Matthew Byrne, Jr.
United States District Judge

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